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Vol. II
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 267

**SIX COMPANIES OF CALIFORNIA, HARTFORD
ACCIDENT AND INDEMNITY COMPANY, ET AL.,
PETITIONERS,**

vs.

**JOINT HIGHWAY DISTRICT No. 13 OF THE STATE
OF CALIFORNIA**

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 22, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

United States

Circuit Court of Appeals

For the Ninth Circuit.

SIX COMPANIES OF CALIFORNIA, a corporation, and
HARTFORD ACCIDENT AND INDEMNITY COMPANY,
a corporation, FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, a corporation, THE AETNA CAS-
UALTY AND SURETY COMPANY, a corporation, IN-
DEMNITY INSURANCE COMPANY OF NORTH
AMERICA, a corporation, AMERICAN SURETY COM-
PANY OF NEW YORK, a corporation, MARYLAND
CASUALTY COMPANY, a corporation, UNITED
STATES FIDELITY AND GUARANTY COMPANY, a
corporation, THE FIDELITY AND CASUALTY COM-
PANY OF NEW YORK, a corporation, GLENS FALLS
INDEMNITY COMPANY, a corporation, STANDARD
SURETY AND CASUALTY COMPANY OF NEW YORK,
a corporation, STANDARD ACCIDENT INSURANCE
COMPANY, a corporation, MASSACHUSETTS BOND-
ING AND INSURANCE COMPANY, a corporation, CON-
TINENTAL CASUALTY COMPANY, a corporation, and
NEW AMSTERDAM CASUALTY COMPANY, a corpo-
ration,

Appellants,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF
CALIFORNIA, a public corporation,

Appellee.

Transcript of Record

In Eight Volumes

VOLUME II

Pages 1 to 468

**Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.**

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District No. 13.

Six Companies of California vs.

In the United States District Court of the Northern District of California, Southern Division

No. 20101R—Law

SIX COMPANIES OF CALIFORNIA, a corporation,

Plaintiff,

vs.

JOINT HIGHWAY DISTRICT NO. 13, OF THE STATE OF CALIFORNIA, a public corporation,

Defendant.

COMPLAINT FOR MONEY

Now comes the plaintiff above named and for cause of action against the above named defendant alleges as follows, to-wit:

I

That plaintiff, Six Companies of California, was at all the dates and times herein mentioned, and still is, a corporation duly incorporated, organized and doing business as such corporation under and by virtue of the authority of the laws of the state of Nevada, and is, and at all the times herein mentioned has been, a citizen of the State of Nevada;

II

That defendant, Joint Highway District, No. 13, of the [1*] State of California, is now, and at all

*Page numbering appearing at the foot of page of original certified Transcript of Record.

the dates and times herein mentioned has been, a public corporation, duly incorporated, organized and existing under and by virtue of the authority of the laws of the State of California, and is now, and at all the dates and times herein mentioned has been, a citizen of the State of California;

III

That this proceeding is one of a civil nature and the parties were at all the dates and times herein mentioned, and still are, citizens of different states;

That the sum involved herein, exclusive of costs and interest, is in excess of \$3,000.00, being the sum of \$3,259,695.04;

IV

That the grounds upon which the jurisdiction of this Court depends are as follows:

(a) The existence of diversity of citizenship between the parties plaintiff and defendant as above set forth; and that said suit is of a civil nature between citizens of different states;

(b) The amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00

V

That within two years last past, said defendant became indebted to this plaintiff in the sum of \$5,280,742.15 for work done, labor performed and materials furnished by said plaintiff to said defendant, at the special instance and request of said defendant;

That no part of said sum has been paid except the sum of \$2,021,047.11, and that there is now due, owing and unpaid from defendant to plaintiff on account of said work done, labor performed and materials furnished, the further sum of [2] \$3,259,695.04, and interest thereon.

Wherefore, plaintiff prays judgment against said defendant.

For a further, separate and second cause of action against said defendant, plaintiff complains and alleges:

I

Plaintiff hereby repeats and adopts each and all of the allegations hereinbefore set forth in Paragraphs I, II, III and IV of the first cause of action herein set forth, and hereby makes each and all of said allegations a part of this its second cause of action as fully as though each and all of said allegations were herein specifically repeated.

II

That within two years last past, said defendant became indebted to this plaintiff for work done, and labor performed and materials furnished by said plaintiff to said defendant of the reasonable value of \$5,280,742.15, and that said sum was and is the reasonable value of said work done, labor performed and materials furnished;

That no part of said sum has been paid except the sum of \$2,021,047.11, and that there is now due, owing and unpaid from defendant to plaintiff on

account of said work done, labor performed and materials furnished, the further sum of \$3,259,695. 04, and interest thereon.

Wherefore, plaintiff prays judgment against said defendant for the sum of \$3,259,695.04, together with interest thereon at the rate of seven per cent. (7%) per annum from the time the respective portions thereof became due and payable, for its costs of suit incurred herein and for such other and different relief as to the Court may seem meet and proper in [3] the premises.

THELEN & MARRIN

By PAUL S. MARRIN

DE LANCEY C. SMITH

J. PAUL ST. SURE

EUGENE E. TREFETHEN

Attorneys for Plaintiff

State of California,
County of Alameda—ss.

Henry J. Kaiser, being first duly sworn, deposes and says: that he is an officer, to-wit: the President of Six Companies of California, a corporation, plaintiff herein, and that he makes this affidavit for and on behalf of said corporation; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and that as to those matters that he believes it to be true.

HENRY J. KAISER

Six Companies of California vs.

Subscribed and sworn to before me this 30th day of June 1936.

[Seal]

PAUL E. ROGERS

Notary Public in and for the county of Alameda,
state of California.

[Endorsed]: Filed Jul. 1, 1936. [4]

In the United States District Court of the Northern District of California, Southern Division.

No. 20101 R

SIX COMPANIES OF CALIFORNIA, a corporation,

Plaintiff & Cross-Defendant,
vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE
STATE OF CALIFORNIA, a public corporation,

Defendant & Cross-Complainant,
and

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation, FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, a
corporation, THE AETNA CASUALTY AND
SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH
AMERICA, a corporation, AMERICAN SUR-

ETY COMPANY OF NEW YORK, a corporation, FIREMAN'S FUND INDEMNITY COMPANY, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLENS FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, PACIFIC INDEMNITY COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Cross-Defendants.

**ANSWER AND CROSS-COMPLAINT OF DEFENDANT AND CROSS-COMPLAINANT
JOINT HIGHWAY DISTRICT NO. 13 OF
THE STATE OF CALIFORNIA. [5]**

Defendant, Joint Highway District No. 13 of the State of California, a public corporation, for answer to the complaint of plaintiff on file herein, and to the first count or cause of action thereof, admits, avers, denies and alleges as follows:

I

Admits the allegations of paragraphs I, II, III and IV of the said first count or cause of action.

II

Denies that within two years last past or at any time or at all said defendant became indebted to plaintiff in the sum of \$5,280,742.15 or in any other sum whatever for work done or labor performed or materials furnished or for any other matter or thing whatever done or performed or furnished by said plaintiff to the defendant at the special instance or request of said defendant or otherwise or at all.

Denies that no part of the said sum has been paid except the sum of \$2,021,047.11, and in this connection said defendant expressly alleges that it has paid said plaintiff any and all sums that were or are owing or due from plaintiff to defendant, and denies there is now due or owing or unpaid from defendant to plaintiff on account of any work done or labor performed or materials furnished, or otherwise or at all, the further sum of \$3,259,695.04 or interest thereon, or any sum at all in any amount whatever.

And as a Second, Separate and Further Defense to said first count said defendant alleges:

I

Alleges that on the 4th day of June, 1934, a contract in writing was duly and regularly entered into

between [6] defendant and plaintiff wherein and whereby plaintiff as contractor agreed with defendant that the said plaintiff, pursuant to the terms of said contract and for and on behalf of defendant, would construct, erect, and complete a certain project of said Joint Highway District No. 13 of the State of California, defendant herein, which project included a highway, highway tunnel and approaches with appurtenant structures, including ventilation buildings, ventilation equipment and accessories, and the construction of highway approaches with pavement, drainage structures, curbs, gutters and sidewalks where required, construction of grade separation structures, viaducts, retaining walls and incidental structures, and connections with existing streets, all as described in said contract between the said parties, which project is located within the boundaries of said defendant District and partly within the City of Oakland, County of Alameda, State of California, and partly within the County of Contra Costa, State of California, all in accordance with the final surveys, plans, specifications and detailed drawings therefor theretofore adopted by the Board of Directors of said Joint Highway District No. 13, said defendant, and which contract, plans and specifications at all times herein mentioned have been on file in the office of said defendant District, and to which reference is hereby expressly made.

II

Upon the letting of said contract plaintiff did commence the construction of the said project and did continue with the said work, receiving each month from defendant the monthly progress payments provided for in said contract for work done during the preceding month, which payments so made by defendant to plaintiff and accepted and retained by plaintiff up to the 13th day of June, 1936, amount to \$2,021,047.11. [7]

III

On the 13th day of June, 1936, and after plaintiff had been so engaged on said work for approximately a period of two years plaintiff quit and abandoned said work and refused to proceed further with the performance of said contract, and did deliver to defendant a notice of abandonment and attempted rescission in the words and figures as follows:

“June 13, 1936

Joint Highway District No. 13
Of The State of California,
1448 Webster Street,
Oakland, California.

Gentlemen:

You are hereby notified that the undersigned, Six Companies of California, has elected to and does hereby terminate and rescind the contract dated June 4, 1934, between the undersigned

and your District for the construction, erection and completion of the project of said Joint Highway District No. 13 of the State of California, which includes a highway, highway tunnels, and approaches with the appurtenant structures located partly in the City of Oakland, County of Alameda, State of California, and partly in the County of Contra Costa, State of California, commonly known as the Broadway Tunnel Project.

Said rescission is made upon the following grounds and each and all of them:

First: Through your fault the consideration for our obligations under said contract has failed in part in that you have failed and refused to pay us the amount estimated by you to be due us under the monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount estimated by you to be due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract, said deduction being computed at the rate of \$500 per day for each day in May 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30, and a non-working day, Sunday, May 31st. Said deduction was and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an

extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any damages for delay in completion of the contract can only be asserted or claimed against the contractor for working days after the contract date for completion. [8]

Second: That the consideration for said contract has failed in a material respect in that you have breached said contract by refusing to pay us the amount due us under your monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract within contract time, said deduction being computed at the rate of \$500 per day for each day in May, 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30th, and a non-working day, Sunday May 31st. Said deduction was and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any damages for delay in completion of

the contract can only be asserted or claimed against the contractor for working days after the contract date for completion.

Third: That in failing to pay said sum mentioned in numbered paragraphs First and Second above and by your refusal to grant said extension of time you have breached said contract, and ground for rescission has arisen in our favor.

Fourth: That your failure and refusal to grant us the extensions of time to which we are entitled as a matter of right and of law for completion of said contract after May 24, 1936, although we have repeatedly requested the grant of such extensions is a breach of the contract.

Fifth: Because the ground encountered in the excavation for the tunnels provided for in the contract has been and is entirely and radically different from the character of ground represented to the contractor as that which would be encountered, and which was contemplated and predicted by the contract, geological report, specifications, plans and any and all other documents forming a portion or part thereof.

Sixth: For your failure and refusal to furnish points, lines and grades for us to work to and other engineering work in the construction of the tunnels as is required to be done or furnished by you by the terms and provisions

of the contract and specifications forming a part thereof.

Seventh: Because the work which is necessarily required to be done to construct the tunnels under the ground conditions actually encountered at their site is not provided for in the contract and was not contemplated by the parties at the time the contract was made.

Eighth: For any and all other grounds of rescission of said contract of June 4, 1934 which may have heretofore existed or which do now exist in favor of the undersigned.

We are returning herewith to you your check #1934 [9] dated June 10, 1936 in purported payment of the estimate for the work done by us during the month of May, 1936.

Very truly yours,

SIX COMPANIES OF CALIFORNIA

By HENRY J. KAISER,

President."

IV.

Upon the receipt of said notice of plaintiff, defendant notified plaintiff that it considered the action of plaintiff in refusing to perform said contract an abandonment thereof, and caused notice to be served upon plaintiff to resume work within three days after the receipt of said notice or the said defendant would construe the said acts of plaintiff as a final abandonment of said contract, which said notice and letter from defendant to plaintiff are in the words and figures as follows:

"June 16, 1936

Six Companies of California
1522 Latham Square Building
Oakland, California

Gentlemen:

Your letter of June 13, 1936 in which you notified this District of a purported termination and rescission of your contract with this District dated June 4, 1934, has been received and considered by the Board of Directors of the District, and this reply thereto is made at the direction of the Directors of the District.

You are hereby advised that Joint Highway District No. 13 of the State of California considers all of the grounds stated by you as a basis for your attempted rescission and termination of the contract are without basis in fact or law; that this District has fully paid all sums required to be paid, performed and done all things required to be performed and done by it under the said contract, and that you, as such contractor, have no valid grounds or reason whatsoever for your attempted rescission and termination of the contract.

You are advised that your cessation of work upon the project and your withdrawal of workmen from the construction of the project constitutes an abandonment by you of the work to be done under the contract that your said [10] acts which unnecessarily and unreasonably delay and continue to delay the work you con-

tracted to perform, and your attempted rescission and termination of the contract, and each and all of them, constitute wilful breaches of the contract by you.

You are further advised that unless you as said contractor resume work on the project and perform the same in accordance with all of the terms thereof within three (3) days of the date of your receipt of this letter, that this District will consider your acts and conduct as aforesaid a final abandonment of the contract and the work to be done thereunder, and the District will proceed to complete the same in accordance with the provisions of the contract, and that the District will hold you and your bondsmen liable for any and all costs thereof in excess of the contract price and any and all damages to this District by reason of your wilful abandonment of the work in violation of the terms of your contract with this District dated June 4, 1934.

Yours very truly,

JOINT HIGHWAY DISTRICT No. 13
OF THE STATE OF CALIFORNIA,
By L. V. EATON,

Assistant Secretary"

V.

Plaintiff on the 13th day of June, 1936, ceased all work under said contract and on said project and ever since said date has refused and still continues to refuse to proceed further therewith.

VI.

(1) At all times herein mentioned said contract between plaintiff and defendant provided that the work to be done under said contract by plaintiff for defendant should be completed within seven hundred and twenty calendar days from and after the execution of the contract and it was stated in said contract that time was of the essence of said agreement; the said period for completion expired on May 24th, 1936.

(2) It is provided in paragraph 3 of said contract that the whole of said work is to be done by plaintiff to the satisfaction and approval of defendant and in strict accordance [11] with the plans and specifications entered into between the parties.

(3) It is further provided in paragraph 4 of said agreement that the plaintiff is skilled in the trade or calling necessary to perform the work agreed to be done under the agreement and that the defendant not being skilled in such matters relied upon the skill of plaintiff to do and perform the work and labor necessary in the most skilful and durable manner. Plaintiff also in said contract guaranteed the said work.

(4) The specifications for said work are expressly made a part of said contract.

(5) Subdivision c of Section 2 of said specifications reads as follows:

“Examination of Plans, Specifications and Site of Work.—The bidder is required to examine carefully the site of the work, the Pro-

posal Form, and plans, specifications and contract forms for the work contemplated. The submission of a Proposal shall be considered prima facie evidence that the bidder has made such an examination and is satisfied as to the conditions to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished, and as to the requirements of the specifications, plans and contract, or contracts."

(6) Subdivision d of Section 4 of the said specifications reads as follows:

"Damages for Delay.—The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual dam-

ages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the [12] District from any money then due, or thereafter to become due, the Contractor."

(7) Subdivision e of Section 6 of said specifications reads as follows:

"Disputes.—To prevent disputes and litigation the District Engineer shall in all cases determine the amount, quality and acceptability of the work and materials which are to be paid for under these specifications. He shall determine all questions in relation to said work and materials and performance thereof and all questions which may arise relative to the fulfillment or interpretation of these specifications on the part of the Contractor. His estimate and decision shall be final and conclusive, and in case any question shall arise between the Contractor and the District pertaining to the contract the District Engineer's estimate and decision shall be a condition precedent to the right of the Contractor to receive any moneys under the contract."

(8) Subdivision h of Section 6 of said specifications reads as follows:

"Interpretation of Plans and Specifications.—Should it appear that the work to be done or any matters relative thereto are not suffi-

ciently detailed or explained in the plans and specifications, the Contractor shall apply to the District Engineer in writing for such further details and explanations as may be necessary, and he shall conform to the same as part of the contract insofar as they may be consistent with the original specifications and plans. In the event of any doubt or question regarding the true meaning of the specifications, the decision of the District Engineer shall be final. In the event of any discrepancy between any drawing and figures written thereon, figures shall be taken as correct.

“Should the Contractor believe that any work ordered is not properly a part of his contract or according to the intent of these plans and specifications, he shall before commencing same notify the District Engineer in writing of his objections to same and shall not perform such work until notified in writing by the District Engineer as to his decision in the matter. The commencement of any such work shall act as a waiver by the Contractor of any objection he may have to the execution of such work, and as a waiver of any claim for extra work in consequence of such order.

“These specifications and plans shall be considered as supplementary one to the other, so that materials and workmanship, indicated, called for, or necessarily implied by the one

and not by the other, shall be supplied and placed in the work the same as though specifically called for by both." [13]

(9) Subdivision k of Section 6 of said specifications reads as follows:

"Contractor's Liability.—On all work the Contractor is to assume all liability of every kind or nature, arising from said work, either from accident, negligence or any cause whatsoever during the progress of the work and before the final acceptance thereof, and shall indemnify and hold the District harmless therefrom, and the bonds given by the Contractor shall hold and secure the said District free and harmless from any or all damage or expense whatsoever."

(10) Subdivision s of Section 6 of said specifications reads as follows:

"Lines and Grades.—The Contractor is to furnish free of charge all stakes necessary for marking and maintaining points and lines given by the District Engineer; and shall give the District Engineer such facilities and materials for giving said lines and points as he may require, and the District Engineer's marks must be carefully preserved.

"Sufficient points to line and grade will be set for the Contractor to work to and no additional stakes will be set. Any such stakes or

marks lost, damaged or obliterated shall be replaced at the expense of the Contractor.

"The Contractor shall do his own engineering and shall be responsible for the completion of the work to proper lines and grades in conformance with the stakes set by the District Engineer.

"The District Engineer shall be furnished facilities for the checking of lines, elevations, grades and forms at all times during the progress of the work. The Contractor shall, without charge to the District, provide openings for and suspend work that will in any way interfere with the surveys, at such times and for such periods as the District Engineer may deem necessary."

(11) The part of said specifications dealing with tunnel construction contains the following provisions:

Section 32, subdivision 3:

"Safety Rules.—The Contractor shall provide himself with copies of 'Tunnel Safety Rules' and 'General Construction Safety Orders Relating to the Storage and Use of Explosives,' together with all revisions and amendments thereto, as required by the Industrial Accident Commission of the State of California and keep copies of these at the site of the work at all times. He shall consult with officials of the In-

dustrial Accident Commission and inform himself of any and all conditions which they may require, whether set forth in [14] the published rules or specially provided for on this work. He shall thoroughly familiarize himself with the provisions of said rules and all regulations of said Commission and govern all his operations by the requirements in all particulars where the same are applicable. He shall see to it that all superintendents, foremen and other employees having responsibility for the various phases of the tunnel work are likewise familiar with the provisions referred to above, and that all work is conducted in accordance therewith. The requirements concerning ventilation, general safety precautions, transportation, roof inspection, timbering, electrical installations and use of explosives are of particular importance.

“Representatives of the U. S. Bureau of Mines and of the Industrial Accident Commission of the State of California shall be afforded free access to the work at all times and be given every facility for inspecting methods, equipment and familiarity of workmen with the various safety rules and requirements.

“All Federal and State regulations for such work of parts thereof and regulations of Counties and Municipalities having local jurisdiction shall be strictly adhered to, and authorized officials representing the Federal or State gov-

ernments or Counties or Municipalities having jurisdiction shall be given every facility for inspection and proper enforcement of rules, provisions, regulations and ordinances which may apply to the conduct of the work. The Contractor shall be responsible during the entire progress of the work for the proper enforcement of all such requirements and shall assume all liabilities which may occur due to accidents of any kind or nature. The fact that no apparent violation of rules or regulations has occurred shall not serve to relieve the Contractor of his full liability or responsibility in case of accident or damage to persons, employees, or to any part of the work.

"Provisions shall be made by the Contractor for a supply of fresh air sufficient for the safety, comfort and efficiency of all persons engaged in the tunnel construction, at all times in all portions of the work. Provision shall be made for the quick removal of gases resulting from blasting and frequent tests shall be made for harmful or explosive gases emanating from the rock structure.

"Should compliance with safety rules and regulations require special equipment the Contractor shall at all times keep on hand on the work enough of such special equipment to supply, in addition to his own requirements, complete equipment for at least three men, for the

use of the District Engineer and his assistants in inspections of the work or in giving lines and grades, or as the District Engineer may direct."

(12) Subdivision 4 of Section 32 reads as follows:

"Geological Data.—A preliminary report on the geological structures through which the tunnel will pass [15] is on file in the office of the District Engineer. This report is available for inspection by prospective bidders at the office of the District Engineer. The Board of Directors of the District and the District Engineer do not guarantee in any respect the accuracy of this report or the findings or recommendations contained therein. The fact that prospective bidders are permitted to inspect this report shall not in any respect relieve prospective bidders of their responsibility to make their own investigations as to the materials which may be encountered or the geological structures, independent and separate from those made by the District, and the Contractor shall have no claim whatsoever for damages, unexpected costs, difficulties, or for the alteration or voiding of the contract, should materials encountered vary in any respect from those indicated in the preliminary report referred to."

VII.

Subsequent to the first day of June, 1936, the District Engineer of defendant estimated and cer-

tified the amount of work done by plaintiff under the terms of said contract for the month of May, 1936, less 3500 dollars stipulated damages for delay as hereinafter alleged and the sum due the plaintiff on or before June 10, 1936 under the terms of said contract, which sum was \$152,086.98, and defendant on June 10, 1936 did transmit to plaintiff the sum of \$148,586.98, the amount of said estimate less the sum of \$3,500.00, the said retained payment of \$3,500.00 being the sum of \$500.00 a day for seven working days retained by defendant as agreed and liquidated damages because the said contract had not been completed within seven hundred and twenty calendar days from the time of entering into the same. The plaintiff herein did on said 13th day of June, 1936 return the amount so paid to plaintiff by defendant, with its said purported notice of rescission.

At no time did the plaintiff demand of defendant the payment of said sum of \$3,500.00 or protest against the withholding of the same, nor make upon the defendant any demand whatever therefor but instead attempted to rescind said contract as aforesaid.

At no time after the tender by defendant to plaintiff of said sum of \$148,586.98 or after the plaintiff had knowledge [16] that defendant had deducted the amount of liquidated damages hereinbefore referred to did the said plaintiff request the District Engineer of defendant to make any determination on said matter or to determine the said or any other

question in relation to the said work and materials furnished by the plaintiff or the performance of said contract or to the fulfillment or interpretation of any clause in the specifications, but the said plaintiff on June 13, 1936, did serve and file its said notice attempting to rescind said contract and did entirely cease all work on said project and did refuse to continue to perform any work under said contract, and ever since has and still continues so to refuse, without making any demand whatever upon defendant District to make the said payments so withheld or to have the matter determined by the District Engineer, or to submit any matter in dispute between plaintiff and defendant to said District Engineer.

The total contract price for the performance of said work was and is a sum in excess of \$3,500,000. When the said plaintiff abandoned said work the work to be performed under said contract was about seventy per cent complete.

VIII

With reference to said attempted rescission said defendant alleges as follows:

(1) Defendant retained the said sum of \$3,500.00 as agreed and liquidated damages because of the failure of plaintiff to complete said contract within the specified time, and defendant at all times was ready, able and willing to submit that matter to the District Engineer for determination in accordance with the provisions of subdivision (c) of Section 6 of said specifications.

(2) With reference to the claim of rescission based [17] upon defendant's failure to grant an extension of time defendant in this connection alleges that plaintiff asked for an extension of time for one hundred and eighty days on the 10th day of June, 1935, which request was refused by defendant on the 12th day of July, 1935. Notwithstanding the refusal of defendant to grant plaintiff the requested extension of time plaintiff continued from the date of said refusal until the 13th day of June, 1936, to perform work under said contract and did receive and accept from defendant during said period of time and on account of said work sums in excess of \$1,000,000.

(3) With reference to the claimed right of rescission because of an alleged claim by plaintiff of difference in underground conditions stated in said notice of June 13, 1936, defendant alleges that the underground conditions were known and ascertained by plaintiff prior to the 1st day of June, 1935, and that notwithstanding plaintiff's claim that such conditions were different from defendant's representations the plaintiff did continue to perform said contract and after full knowledge of said conditions received and accepted in excess of \$1,000,000 from defendant as compensation for its work under said contract.

(4) With reference to the claimed failure of defendant to furnish points, lines and grades for the work of said plaintiff and to furnish other engineering work, defendant alleges that plaintiff as

early as the 26th day of December, 1934, made a claim to defendant with reference to said matters, and defendant's position in regard thereto, namely, that plaintiff's claim was not well founded, was communicated to plaintiff as early as the 22nd day of January, 1935; that notwithstanding plaintiff's knowledge of the position taken by defendant with reference to this claim plaintiff continued to work under said contract up to and until the 13th day of June, 1936, [18] and from the time of the first making of said claim until the cessation of work plaintiff received from defendant sums in excess of \$1,400,000 in connection with its work under said contract.

With reference to all of said matters stated in said notice of rescission, at no time did plaintiff request that these or any of such be submitted to the said District Engineer of defendant in order that said District Engineer might determine any and all questions in relation to said work and materials and the performance of said contract or any and all questions which had arisen relative to the fulfillment or interpretation of specifications on the part of the plaintiff, which said specifications at all times were and now are a part of said contract. Said District Engineer was never so requested by plaintiff, nor was demand made by plaintiff upon defendant to have these matters in dispute submitted to the said District Engineer for decision.

By reason of all the foregoing plaintiff has waived any right, if it ever had any such, to re-

scind the said contract because of said matters so specified in said purported notice of rescission or any of them, and any right of plaintiff to rescind, if it ever had any such, was and is waived by acquiescence, laches and delay. At no time did plaintiff have a right to rescind said contract or any part thereof.

IX.

At no time from the time of the entering into of said contract by plaintiff until the abandonment of the said work and contract on the 13th day of June, 1936, did plaintiff before commencing any work which plaintiff claimed was not properly a part of the work under said contract, notify the District Engineer in writing of plaintiff's objection to the same and [19] refusal to perform such work until notified in writing by said Engineer of his decision in the matter, but on the contrary the said plaintiff without such written objection and without any written decision by said Engineer did continue with said work and did perform all work under said contract until the 13th day of June, 1936, when the same was abandoned by plaintiff as aforesaid.

And As A Third, Separate And Further Defense to said first count said defendant alleges:

I.

At all times herein mentioned defendant was and is a Joint Highway District of the State of California organized and existing under and by virtue

of that certain act of the Legislature of the State of California known and designated as the Joint Highway District Act. Said defendant District is and was incorporated for the purpose of constructing a project in the contract between plaintiff and defendant hereinafter mentioned specifically described, said project lying wholly within the boundaries of the said District and partly within the City of Oakland, County of Alameda, and the County of Contra Costa, State of California.

II.

Subsequent to its organization the defendant District caused final surveys, plans, specifications and detailed drawings to be prepared for said project and did include therewith the final estimate of the cost of said project, and the same were approved by the board of supervisors of each of the counties within said District, namely, the Board of Supervisors of the County of Alameda and the Board of Supervisors of the County of Contra Costa, State of California, and by the Director of the [20] Department of Public Works of the State of California, and a certified copy of said final surveys, plans, specifications and detailed drawings and of said estimated cost was transmitted to the Director of said Department of Public Works of the State of California.

III.

After the approval of said final plans and specifications as aforesaid, the defendant did cause a

notice inviting sealed proposals and bids for the construction of its said project to be published twice in a newspaper of general circulation published and circulated within the District, namely, in "The Oakland Tribune," which newspaper was designated for such purpose by the Board of Directors of said District, the first publication of which notice inviting said bids was printed and published on May 7th, 1934, and not less than ten days prior to the time fixed for receiving such bids. Pursuant to said notice bids for the construction and completion of said project were received and opened on the 22nd day of May, 1934, and the bid of plaintiff for the sum of approximately \$3,683,-931.00 for the construction and completion of said project and the performance of all work in connection therewith was accepted by defendant and the contract awarded to plaintiff as the lowest responsible bidder; that plaintiff was in fact the lowest responsible bidder for said work.

IV.

Thereafter, and on the 4th day of June, 1934, pursuant to said call for bids and the bid of plaintiff and the award made to plaintiff by defendant, a contract in writing was entered into between plaintiff and defendant wherein and whereby plaintiff agreed with defendant that plaintiff pursuant to the terms of said contract and for and on behalf of defendant would [21] construct, erect and complete the said project of defendant and do and per-

form all work in connection therewith, all as described in said contract and all in accordance with the final surveys, plans, specifications and detailed drawings therefor theretofore adopted by the Board of Directors of said Joint Highway District No. 13, and which said contract, plans and specifications at all times herein mentioned have been on file in the office of the defendant District and to which reference is hereby expressly made.

V.

The said contract so let pursuant to the said bid of plaintiff included all work which was to be done in connection with said project, and no other contract with plaintiff was ever let therefor nor for any part thereof, and until said work was abandoned by plaintiff no other call for bids was ever made and no other final surveys, plans, specifications, detailed drawings or estimates for said work have been made.

VI.

Pursuant to said contract of June 4, 1934, defendant from time to time has paid plaintiff the monthly progress payments provided for in said contract and continued to make such payments up and until the 13th day of June, 1936, on which date plaintiff abandoned said contract and work and refused and still refuses to continue to perform said work or to complete the said project or any part thereof.

VII.

Said plaintiff has not been requested by defendant to perform any work except the work specified in said contract, and plaintiff has performed no other work for defendant and has made no bid for any other work. The said contract of June 4, 1934, is the sole and only contract and the sole and only understanding [22] between the plaintiff and defendant for the performance of the work specified in said contract.

VIII.

Said final surveys, plans, specifications and detailed drawings so prepared by said defendant District did include a final estimate of cost, which estimate did not exceed the estimate named in the preliminary report of the District Engineer for said project. The bid of plaintiff was within the said final estimate. The purported claim of plaintiff sued upon herein exceeds its said bid and the said final estimate by a sum greatly in excess of ten per cent of said final estimate. There has been no approval by the Board of Supervisors of any County comprising said District or of the Director of the Department of Public Works of the State of California of the said increase in costs sought to be recovered by plaintiff herein. The State of California has contributed a part of the cost of said project, namely, the sum of \$700,000.

IX.

Defendant has no power nor authority to contract for construction work except as authorized by the

provisions of said Joint Highway District Act, and any attempt upon the part of said defendant District or any of its officers or employees to create a liability for construction purposes other than as in said Act provided, after public notice and call for bids, is ultra vires and void.

And As A Fourth, Separate And Further Defense to said first count and by way of counterclaim said defendant alleges:

I.

Defendant repeats and hereby incorporates as a part of this defense and counterclaim the allegations of paragraphs [23] I, II, III and IV of its third separate defense to said first count herein.

II.

Plaintiff proceeded with the work specified to be done in said contract of June 4, 1934, between the plaintiff and defendant, and continued with said work up to and including the 13th day of June, 1936, upon which date the plaintiff abandoned the said contract and the said work and then and there refused and ever since has refused to continue with the same or to further perform said agreement or any part thereof.

III.

Upon the abandonment of said contract by plaintiff it became necessary for defendant: (a) to protect and maintain said work in the unfinished state

in which it had been left upon the abandonment of said contract; (b) to measure said work in order to call for bids for the completion of the same, and to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States for the completion of the work; (c) to readvertise for bids for such completion; and (d) to secure insurance protecting the defendant against loss by fire and against certain other hazards hereinafter mentioned.

In connection with the maintenance and protection of said work it was necessary for defendant to employ engineers, watchmen and laborers, and to secure materials, supplies and equipment. The reasonable cost of all such protection and maintenance at all times herein mentioned was and is the sum of \$47944.33.

At all times herein mentioned the reasonable cost of measuring said work and of completing said specifications was [24] and is the sum of \$5134.22.

In order to secure bids for new contracts to complete the work it was necessary to readvertise for such purpose, and at all times herein mentioned the reasonable cost of such advertising was and is the sum of \$1862.45.

Upon such abandonment by plaintiff the defendant did secure fire insurance protecting the defendant against the hazard of fire to its property and equipment in said project, and did also secure

Workmen's Compensation and Liability insurance protecting the defendant against claims for injury to any of its employees and for damage or injury to others by reason of the operations of the defendant in maintaining and protecting said work; the reasonable cost of all said insurance at all times herein mentioned was and is the sum of \$14060.85.

Said sums in this paragraph mentioned in the aggregate amount to \$69001.85, and at all times herein mentioned were and are reasonable.

IV.

Said contract provided for progress payments to be made each month by defendant to plaintiff for work done during the preceding month and said contract also provided for the retention by defendant of a sum which in the aggregate should not exceed ten per cent of the contract price, said retained sum to be paid to plaintiff thirty-five days after the completion of the contract by plaintiff. Prior to said default of plaintiff, defendant had paid to plaintiff the sum of \$2,021,047.11, which sum represented ninety per cent of the contract price for work done by plaintiff for defendant prior to May 1, 1936, and the defendant retained from said progress payments the sum of \$224,560.79, or ten per cent of the contract price for work done prior to May 1, 1936. Plaintiff refused to accept the sums [25] tendered by defendant for work performed by plaintiff after May 1, 1936, and defendant has in its possession the sum of \$265,891.82 for all work

performed by plaintiff after May 1, 1936, as per estimate and also the said sum of \$224,560.79 the said retained percentage above referred to, also a credit for plaintiff of \$2806.55 for partly performed work less \$10,000 liquidated damages retained by defendant, said sums aggregating \$493,259.16.

The reasonable cost of completing the work agreed to be done by plaintiff which remained uncompleted when plaintiff abandoned the same was and is the sum of \$1,751,611.74. Said sum exceeds the sum specified in said contract of June 4, 1934, to be paid by defendant to plaintiff for such work by the sum of \$591,325.47. The difference between this last mentioned amount and the sum of \$483,259.16, the aggregate amount still retained by defendant for work done by plaintiff prior to the abandonment of the contract (less liquidated damages of \$10,000 retained) is the sum of \$108,066.31, which last mentioned sum is the reasonable increased cost of completing the work over the contract price because of plaintiff's default, less credit to plaintiff for any sums heretofore earned by plaintiff and still in defendant's possession.

V.

Under the provisions of said contract of June 4, 1934, the time when plaintiff was to complete all of the work expired on the 24th day of May, 1936, and when said work was abandoned by plaintiff on June 13, 1936, plaintiff was in default in the completion of said work for a period of twenty days.

Upon the abandonment of said work by plaintiff it became necessary for defendant to measure said work in order that it could call for bids to complete the same, to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States for the completion of the work, and to readvertise for bids for such completion and [26] to enter into contracts therefor. The time required for all of said purposes was one hundred and forty-nine days and the said period of time was and is a reasonable time therefor, and said defendant did proceed with all reasonable dispatch and due diligence so to do.

The first new contract for the completion of the work was entered into on the 9th day of November, 1936, and the reasonable time for the completion of all said work was and is a period of two hundred and sixty-four days from and after said last mentioned date.

The periods of delay in the completing of said work caused by the default of said plaintiff are as follows: A period of twenty days from May 24, 1936, when said time for completion expired, to June 13, 1936, when plaintiff abandoned said contract; a period of one hundred and forty-nine days, the reasonable time to measure the said work remaining to be done after plaintiff's default in order to call for bids for the completion of the contract and to secure approval of supplemental specifica-

tions by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States, and to readvertise for bids for the completion of said work and to enter into the first new contract therefor; a period of two hundred and sixty-four days, the reasonable time for the completion of all said work after the entering into of said new contract. All said periods of time were and are reasonable and amount in the aggregate to four hundred and thirty-three (433) days delay in the completion of said work, all caused by the action and default of plaintiff.

VI.

It is provided in said contract of June 4, 1934, that the said contractor, plaintiff herein, shall pay to the defendant [27] as agreed and liquidated damages \$500 for each and every working day which may elapse between the limiting date provided in said contract and the date of the actual completion of the work, and that said sum is specifically agreed upon between the parties as a measure of damage to the defendant by reason of delay in the completion of the work, it being expressly understood and agreed that it would be impracticable to estimate and ascertain the actual damage sustained by the defendant District because of such delay.

VII.

In this connection defendant alleges that it is and at all times herein mentioned was extremely diffi-

cult to estimate the damage which would be sustained by defendant because of any delay in the completion of the project of defendant District. The work to be done by said plaintiff for the defendant consisted of the construction of a highway tunnel and approaches and appurtenances, a portion of one of the main highways in Alameda and Contra Costa Counties; said highway connects with and is a part of the State system of highways at either extremity of said work. Said route is a main artery of travel from the San Joaquin Valley to the congested East Bay area in Alameda and Contra Costa Counties and also leading across the new bridge from the City of Oakland to the City and County of San Francisco. From a large area of the State it is a more practical, direct and safer route than any highway now in existence connecting the points above mentioned and is greatly needed by the traveling public.

Defendant's project provides a modern highway of low gradients between Walnut Creek, Contra Costa County, and the business center of Oakland, approximately one and one-half miles shorter than the Claremont Road and approximately two and one-half miles shorter than the Tunnel Road, the present highways, [28] each of which is a narrow highway of steep gradients and sharp curves and which now carry a combined traffic in excess of 1,600,000 vehicles per year, all of which traffic can be more safely and economically transported over the new route. The resulting loss, inconvenience

and damage caused by the delay in opening the project to use as a public highway is exceedingly great and is impracticable of exact ascertainment but exceeds \$500 per day.

In this connection defendant further alleges that because of plaintiff's abandonment and the necessary delay required for the letting of new contracts, and because of the delay in completing said work, defendant has been and will be required until the work is completed to maintain a large staff of engineers and other employees and keep an active District organization intact, all at a reasonable cost to said District of approximately \$288 a day, which cost will be entirely eliminated upon the completion of said project, which expense to defendant results solely from the delay caused by plaintiff's default in the performance of said contract. Said cost and expense in this paragraph alleged is in addition to any claim for damage specified in paragraphs III and IV of this defense and counterclaim.

Defendant has financed the cost of said project by the issuance of bonds upon which defendant must pay interest, and defendant will pay in interest for the said period of four hundred and thirty-three (433) days delay caused by the default of said plaintiff, without having the enjoyment of said project, a sum in excess of \$89,832.67.

For the reasons above stated and because of the difficulty in ascertaining the actual damage, the parties agreed upon liquidated damages as aforesaid. [29]

VIII.

Defendant asserts by way of counterclaim against the said plaintiff the following: The sum of \$69,001.85, the reasonable cost of protection and measuring the work and of the other matters hereinbefore in paragraph III hereof alleged; the sum of \$108,066.31, the increased reasonable cost for completing the contract abandoned by plaintiff in excess of all credits due plaintiff for work heretofore performed by plaintiff for defendant under said contract, the sum of \$206,500.00 as agreed and liquidated damages; said sums amount in the aggregate to \$383,568.16, and no part thereof has been paid.

And For Answer to the Second Count or Cause of Action stated in the complaint of plaintiff on file herein said defendant admits, avers, denies and alleges as follows:

I.

Denies that within two years last past or at any other time or at all said defendant became indebted to plaintiff for work done or labor performed or materials furnished by said plaintiff to said defendant, or otherwise or at all, of the reasonable or any value of \$5,280,742.15, or in any other sum whatever or at all, and denies that said or any sum was or is the reasonable or any value of said work done or labor performed or materials furnished.

Denies that no part of said sum has been paid except the sum of \$2,021,047.11, and in this connection said defendant expressly alleges that it has

paid said plaintiff any and all sums that were or are owing or due from defendant to plaintiff, and denies that there is now due or owing or unpaid from defendant to plaintiff on account of any work done or labor performed or materials furnished, or otherwise, or at all the [30] further sum of \$3,259,-695.04 or interest thereon or any sum at all in any amount whatever.

And As A Second, Separate And Further Defense to said Second Count said defendant alleges:

I.

Defendant repeats and hereby incorporates as a part of this defense each and all of the allegations hereinbefore set forth in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of its second and separate defense to the first count or cause of action of plaintiff's complaint and makes each and all of said allegations a part of this its second defense to the said second count contained in said complaint as fully as though each and all of said allegations were herein specifically repeated.

And As A Third, Separate And Further Defense to said second count said defendant alleges:

I.

Defendant repeats and hereby incorporates as a part of this defense each and all of the allegations hereinbefore set forth in paragraphs I, II, III, IV, V, VI, VII, VIII and IX of its third and separate

defense to the first count or cause of action of plaintiff's complaint and makes each and all of said allegations a part of this its third defense to the said second count contained in said complaint as fully as though each and all of said allegations were herein specifically repeated.

And As A Fourth, Separate And Further Defense to said second count and by way of counterclaim said defendant alleges:

I.

Defendant repeats and hereby incorporates as a part [31] of this defense and counterclaim the allegations of paragraphs I, II, III and IV of its third and separate defense to said first count herein and makes each and all of said allegations a part of this its fourth separate and further defense and counterclaim to the said second count contained in said complaint as fully as though each and all of said allegations were herein specifically repeated.

II.

Defendant repeats and hereby incorporates as a part of this defense and counterclaim the allegations of paragraphs II, III, IV, V, VI, VII and VIII of its fourth, separate and further defense and counterclaim to the first count or cause of action stated in plaintiff's complaint and makes each and all of said allegations a part of this its fourth, separate and further defense and counterclaim to said second count contained in said complaint as fully

as though each and all of said allegations were herein specifically repeated. [32]

CROSS-COMPLAINT

Without waiving any of the allegations of its answer herein and by way of cross-complaint, said defendant complains of plaintiff and cross-defendant, and of each and every of the above named cross-defendants, and for cause of action alleges:

I.

Defendant and cross-complainant, Joint Highway District No. 13 of the State of California, at all the dates and times herein mentioned was and is now a public corporation duly organized and existing under and by virtue of the laws of the State of California, particularly that certain act known and designated as the Joint Highway District Act.

II.

Plaintiff and cross-defendant, Six Companies of California, at all the dates and times herein mentioned was and is now a corporation duly incorporated, organized and existing under and by virtue of the law of the State of Nevada.

III.

Each of the cross-defendants hereinafter mentioned, at all the dates and times herein mentioned, was and is now a corporation duly incorporated,

organized and existing under and by virtue of the laws of one of the several states of the Union as hereinafter in this paragraph respectively designated for each of said respective cross-defendants:

(a) Hartford Accident and Indemnity Company, a Connecticut corporation;

(b) Fidelity and Deposit Company of Maryland, a Maryland corporation;

(c) The Aetna Casualty and Surety Company, a Connecticut corporation; [33]

(d) Indemnity Insurance Company of North America, a Pennsylvania corporation;

(e) American Surety Company of New York, a New York corporation;

(f) Fireman's Fund Indemnity Company, a California corporation;

(g) Maryland Casualty Company, a Maryland corporation;

(h) United States Fidelity and Guaranty Company, a Maryland corporation;

(i) The Fidelity and Casualty Company of New York, a New York corporation;

(j) Glens Falls Indemnity Company, a New York corporation;

(k) Standard Surety And Casualty Company of New York, a New York corporation;

(l) Standard Accident Insurance Company, a Michigan corporation;

(m) Pacific Indemnity Company, a California corporation;

(n) Massachusetts Bonding And Insurance Company, a Massachusetts corporation;

(o) Continental Casualty Company, an Indiana corporation;

(p) New Amsterdam Casualty Company, a New York corporation.

IV.

On the 4th day of June, 1934, a contract in writing was entered into between Six Companies of California, a corporation, plaintiff herein, and defendant, wherein and whereby plaintiff agreed with defendant that the plaintiff pursuant to the terms [34] of said contract and for and on behalf of defendant would construct, erect and complete the project of the defendant in said contract specifically described and do and perform all work in connection therewith, all as more fully described in said contract and all in accordance with the final surveys, plans, specifications and detailed drawings therefor theretofore adopted by the Board of Directors of said defendant Joint Highway District No. 13, and which said contract, plans and specifications at all times herein mentioned have been on file in the office of the defendant District and to which reference is hereby made.

V.

Plaintiff as said contractor did, upon the delivery of said contract to the defendant, deliver with said contract and annexed thereto a certain bond for the

faithful performance of said contract, which bond was executed by the plaintiff and cross-defendant and by each of the other cross-defendants above mentioned. Said bond when delivered was annexed to said contract and was a part thereof.

The bond above referred to, so made, executed and delivered by the plaintiff and cross-defendant and by each and every of the other cross-defendants to the defendant and cross-complainant herein, is hereto attached marked Exhibit "A" and expressly made a part hereof for all purposes.

VI.

Plaintiff proceeded with the work specified to be done in said contract between plaintiff and defendant and continued with said work up to and including the 13th day of June, 1936, upon which date the plaintiff abandoned the said contract and the said work and then and there refused, and ever since has refused, to continue with the same or to further perform said agreement or any part thereof. [35]

VII.

Upon the abandonment of said work defendant notified plaintiff and cross-defendant and each of the other cross-defendants that it considered the action of plaintiff in refusing to perform said contract an abandonment thereof, and said defendant and cross-complainant caused notice to be served upon plaintiff and cross-defendant and upon each and every of the other cross-defendants to resume

work within three days after the receipt of said notice or the said defendant would construe said acts of the plaintiff as a final abandonment of said contract; a copy of which said notice so delivered to the plaintiff and cross-defendant and to all of the other cross-defendants herein is hereinbefore set forth in paragraph IV of defendant's second, separate and further defense to the first count of the complaint of plaintiff on file herein, to which reference is hereby expressly made.

VIII.

Notwithstanding the receipt of said notice by said plaintiff and cross-defendant and by each of the other cross-defendants the said plaintiff and cross-defendant, and each of the other cross-defendants, then and there refused and ever since have refused to continue with the said work or to further perform said contract or any part thereof or any of the work thereunder.

IX.

Upon the abandonment of said contract by plaintiff it became necessary for defendant: (a) to protect and maintain said work in the unfinished state in which it had been left upon the abandonment of said contract; (b) to measure said work in order to call for bids for the completion of the same and to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the [36] Public Works Emergency Administration of the United

States for the completion of the work; (c) to re-advertise for bids for such completion, and (d) to secure insurance protecting the defendant against loss by fire and against certain other hazards hereinafter mentioned.

In connection with the maintenance and protection of said work it was necessary for defendant to employ engineers, watchmen and laborers, and to secure materials, supplies and equipment. The reasonable cost of all such protection and maintenance at all times herein mentioned was and is the sum of \$47,944.33.

At all times herein mentioned the reasonable cost of measuring said work and of completing said specifications was and is the sum of \$5,134.22.

In order to secure bids for new contracts to complete the work it was necessary to readvertise for such purpose, and at all times herein mentioned the reasonable cost of such advertising was and is the sum of \$1,862.45.

Upon such abandonment by plaintiff the defendant did secure fire insurance protecting the defendant against the hazard of fire to its property and equipment in said project, and did also secure Workmen's Compensation and Liability insurance protecting the defendant against claims for injury to any of its employees and for damage or injury to others by reason of the operations of the defendant in maintaining and protecting said work; the reasonable cost of all of said insurance at all times

herein mentioned was and is the sum of \$14,060.85.

Said sums in this paragraph mentioned in the aggregate amount to \$69,001.85, and at all times herein mentioned were and are reasonable. [37]

X.

Said contract provided for progress payments to be made each month by defendant to plaintiff for work done during the preceding month and said contract also provided for the retention by defendant of a sum which in the aggregate should not exceed ten per cent of the contract price, said retained sum to be paid to plaintiff thirty-five days after the completion of the contract by plaintiff. Prior to said default of plaintiff, defendant had paid to plaintiff the sum of \$2,021,047.11, which sum represented ninety per cent of the contract price for work done by plaintiff for defendant prior to May 1, 1936, and the defendant retained from said progress payments the sum of \$224,560.79, or ten per cent of the contract price for work done prior to May 1, 1936. Plaintiff refused to accept the sums tendered by defendant for work performed by plaintiff after May 1, 1936, and defendant has in its possession the sum of \$265,891.82 for all work performed by plaintiff after May 1, 1936, as per estimate and also the said sum of \$224,560.79 the said retained percentage above referred to, also a credit for plaintiff of \$2,806.55 for partly performed work said sums aggregating \$493,259.16 less liquidated damages of \$10,000 retained by defendant.

The reasonable cost of completing the work agreed to be done by plaintiff which remained uncompleted when plaintiff abandoned the same was and is the sum of \$1,751,611.74. Said sum exceeds the sum specified in said contract of June 4, 1934, to be paid by defendant to plaintiff for such work by the sum of \$591,325.47. The difference between this last mentioned amount and the sum of \$483,259.16, the aggregate amount still retained by defendant for work done by plaintiff prior to the abandonment of the contract (less liquidated damages of \$10,000 retained) is the sum of \$108,066.31, which last mentioned sum is the reasonable increased cost of completing the work over the contract price because of plaintiff's default, less credit to plaintiff for any sums heretofore earned by [38] plaintiff and still in defendant's possession.

XI.

Under the provisions of said contract of June 4, 1934, the time when plaintiff was to complete all of the work expired on the 24th day of May, 1936, and when said work was abandoned by plaintiff on June 13, 1936, plaintiff was in default in the completion of said work for a period of twenty days.

Upon the abandonment of said work by plaintiff it became necessary for defendant to measure said work in order that it could call for bids to complete the same, to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the

Public Works Emergency Administration of the United States for the completion of the work, and to readvertise for bids for such completion and to enter into contracts therefor. The time required for all of said purposes was one hundred and forty-nine days and the said period of time was and is a reasonable time therefor, and said defendant did proceed with all reasonable dispatch and due diligence so to do.

The first new contract for the completion of the work was entered into on the 9th day of November, 1936, and the reasonable time for the completion of all said work was and is a period of two hundred and sixty-four days from and after said last mentioned date.

The periods of delay in the completing of said work caused by the default of said plaintiff are as follows: A period of twenty days from May 24, 1936, when said time for completion expired, to June 13, 1936, when plaintiff abandoned said contract; a period of one hundred and forty-nine days, the reasonable time to measure the said work remaining to be done after plaintiff's default in order to call for bids for the completion of the contract and to secure approval of supplemental [39] specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States, and to readvertise for bids for the completion of said work and to enter into the first new contract therefor; a period of two hundred and sixty-four days, the

reasonable time for the completion of all said work after the entering into of said new contract. All said periods of time were and are reasonable and amount in the aggregate to four hundred and thirty-three (433) days delay in the completion of said work, all caused by the action and default of plaintiff.

XII.

It is provided in said contract of June 4, 1934, that the said contractor, plaintiff herein, shall pay to the defendant as agreed and liquidated damages \$500 for each and every working day which may elapse between the limiting date provided in said contract and the date of the actual completion of the work, and that said sum is specifically agreed upon between the parties as a measure of damage to the defendant by reason of delay in the completion of the work, it being expressly understood and agreed that it would be impracticable to estimate and ascertain the actual damage sustained by the defendant District because of such delay.

XIII.

In this connection defendant alleges that it is and at all times herein mentioned was extremely difficult to estimate the damage which would be sustained by defendant because of any delay in the completion of the project of defendant District. The work to be done by said plaintiff for the defendant consisted of the construction of a highway tunnel and approaches and appurtenances, a portion

of one of the main highways in Alameda and Contra Costa Counties; said highway connects with and is a part [40] of the State system of highways at either extremity of said work. Said route is a main artery of travel from the San Joaquin Valley to the congested East Bay area in Alameda and Contra Costa Counties and also leading across the new bridge from the City of Oakland to the City and County of San Francisco. From a large area of the State it is a more practical, direct and safer route than any highway now in existence connecting the points above mentioned and is greatly needed by the traveling public.

Defendant's project provides a modern highway of low gradients between Walnut Creek, Contra Costa County, and the business center of Oakland, approximately one and one-half miles shorter than the Claremont Road and approximately two and one-half miles shorter than the Tunnel Road, the present highways, each of which is a narrow highway of steep gradients and sharp curves and which now carry a combined traffic in excess of 1,600,000 vehicles per year, all of which traffic can be more safely and economically transported over the new route. The resulting loss, inconvenience and damage caused by the delay in opening the project to use as a public highway is exceedingly great and is impracticable of exact ascertainment but exceeds \$500 per day.

In this connection defendant further alleges that because of plaintiff's abandonment and the neces-

sary delay required for the letting of new contracts, and because of the delay in completing said work, defendant has been and will be required until the work is completed to maintain a large staff of engineers and other employees and keep an active District organization intact, all at a reasonable cost to said District of approximately \$272.89 a day, which cost will be entirely eliminated upon the completion of said project, which expense to defendant results solely from the delay caused by plaintiff's default in [41] the performance of said contract. Said cost and expense in this paragraph alleged is in addition to any claim for damage specified in paragraphs IX and X of this cross-complaint.

Defendant has financed the cost of said project by the issuance of bonds upon which defendant must pay interest, and defendant will pay in interest for the said period of four hundred and thirty-three (433) days delay caused by the default of said plaintiff, without having the enjoyment of said project, a sum in excess of \$89,832.67.

For the reasons above stated and because of the difficulty in ascertaining the actual damage the parties agreed upon liquidated damages as aforesaid.

XIV.

The aggregate damages above referred to which defendant claims by way of cross-complaint are as follows: the sum of \$69,001.85, the reasonable cost of protecting and measuring the work and of the other matters hereinbefore in paragraph IX hereof

alleged; the sum of \$108,066.31, the increased reasonable cost for completing the contract abandoned by plaintiff in excess of all credits due plaintiff for work heretofore performed by plaintiff for defendant under said contract, as hereinbefore in paragraph X hereof alleged, and the sum of \$206,500.00 as agreed and liquidated damages; said sums amount in the aggregate to \$383,568.16, and no part thereof has been paid.

Wherefore, defendant and cross-complainant prays judgment as follows:

(a) That plaintiff take nothing by its said complaint;

(b) That defendant and cross-complainant have judgment against the plaintiff and cross-defendant for the sum of [42] \$383,568.16, the aggregate amount of damages sustained by defendant and cross-complainant because of the default of said plaintiff and cross-defendant as aforesaid;

(c) That defendant and cross-complainant have judgment against each and every of the other cross-defendants for the proportion of the said sum of \$383,568.16 represented by the respective percentages of liability assumed by each of said other cross-defendants on the said bond given by such cross-defendants collectively for the faithful performance of said contract upon the part of the plaintiff;

(d) For such other, further and additional relief as may be meet and proper; and

(e) For defendant and cross-complainant's costs of suit herein incurred.

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,

Attorneys for Defendant and
Cross-Complainant. [43]

State of California,
County of Contra Costa—ss.

Harry M. Stow, being duly sworn, deposes and says:

That he is and was at all the dates and times herein mentioned an officer, to-wit, the Secretary, of Joint Highway District No. 13 of the State of California, a public corporation, defendant and cross-complainant herein; that he has read the foregoing Answer and Cross-Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that he makes this verification for and on behalf of said defendant and cross-complainant.

HARRY M. STOW,

Subscribed and sworn to before me this 16th day of December, 1936.

[Notarial Seal] ELIZABETH KING,
Notary Public in and for the County of Contra
Costa, State of California. [44]

[Clerk's Note: Exhibit A to Cross Complaint is here omitted as same is set out as Plaintiff's Exhibit 18 in the Book of Exhibits.]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Comes, now, Six Companies of California, plaintiff and cross-defendant above named, and answers the cross-complaint on file herein by defendant and cross-complainant, and admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraph I, II [54] and III of the cross-complaint.

II.

Answering the allegations contained in paragraph IV of the cross-complaint admits that a contract in writing was entered into between plaintiff and defendant on the 4th day of June, 1934, but denies each and all the remaining allegations in said paragraph contained, commencing with the word "wherein" on line 30 of page 30 of the cross-complaint to and including the end of said paragraph on line 10 on page 31 of the cross-complaint.

III.

Admits the allegations contained in paragraph V of the cross-complaint.

IV.

Answering the allegations contained in paragraph VI of said cross-complaint plaintiff denies that on June 13th, 1936, or at any time, or at all, it abandoned said contract, or the work to be done thereunder. In this connection plaintiff alleges that on

June 13th, 1936, plaintiff, for good and sufficient reasons and in accordance with law, as hereinafter more specifically stated, duly rescinded said contract and that since said date plaintiff has done no work under said contract.

V.

Answering the allegations contained in paragraph VII of the cross-complaint denies each and all, generally and specifically the allegations in said paragraph contained, save and except that plaintiff admits a notice was sent in the form stated in said paragraph by defendant to plaintiff.

VI.

Answering the allegations contained in paragraph VIII of said cross-complaint, plaintiff admits that, after rescinding said contract on June 13th, 1936, it has refused further to perform the same or do any work thereunder and denies generally [55] and specifically each and every other allegation in said paragraph contained.

VII.

Answering the allegations contained in paragraph IX of said cross-complaint, plaintiff denies that it ever abandoned said contract and alleges that it has no information or belief concerning the other matters or allegations set forth in said paragraph and placing its denial on that ground denies generally and specifically each and every of said other matters or allegations and statements of fact in said paragraph contained.

VIII.

Answering the allegations contained in paragraph X of said cross-complaint plaintiff admits the allegation commencing with the word "said" in line 2 and ending with the word "plaintiff" in line 8; denies the allegations contained in said paragraph commencing with the word "prior" in line 8 and ending with the figures "1936" in line 14, except that plaintiff admits that it has received from defendant the sum of \$2,021,047.11 and defendant has retained at least the sum of \$224,560.79. Plaintiff admits the allegations contained in said paragraph commencing with the word "plaintiff" in line 14 and ending with the figures "490,452.61" in line 19, except that the amounts therein are less than the full amount of money due and payable from defendant to plaintiff for work done by plaintiff for defendant, as more particularly hereinafter in this answer alleged.

Further answering the allegations contained in paragraph X of said cross-complaint, plaintiff denies that the reasonable cost of completing the work described in said contract between it and defendant was or is the amount of \$1,725,000.00 or, as plaintiff is informed and believes and accordingly alleges, any other sum in excess of the amount of approximately \$1,000,000.00 [56] However, plaintiff does not admit or deny that the cost of completing the project of defendant is or will be \$1,725,000.00 and in this connection plaintiff alleges that it never agreed, in said contract, or otherwise,

to construct the tunnels being constructed as a part of said project in the manner in which it is necessary in fact to construct the same, because of the conditions of the ground in which the same are being constructed, and that any cost of completing the project of said defendant in excess of the amount of approximately \$1,000,000.00 is due to the fact that said tunnels are being, and because of the nature of the ground, must be, constructed in a manner radically different from that specified in said contract and the plans and specifications forming a part thereof.

Further answering the allegations of said paragraph plaintiff, except as hereinbefore expressly admitted, denies generally and specifically each and every allegation in said paragraph contained.

IX.

Answering the allegations contained in paragraph XI of the cross-complaint, denies each and all, generally and specifically, the allegations in said paragraph contained, save and except plaintiff admits it will take 264 days from the commencement of such work to complete the remainder of the construction of the project described in the answer and cross-complaint.

X.

Answering the allegations contained in paragraph XII of said cross-complaint, plaintiff alleges that said contract provides as follows:

“Section 4. Time

“(a) Commencement of Work.—The Contractor shall commence work within ten (10) days after the execution of the contract for the work by the Board of Directors and shall continue without interruption unless otherwise directed by the [57] District. At least three (3) days before starting, the Contractor shall notify the District Engineer in writing of the date that work is to commence.

“(b) Completion of Work.—The time of completion of the entire work specified herein shall be within a period of seven hundred and twenty (720) calendar days from the date of the execution of the contract by the Board of Directors.

“(c) Extension of Time.—The time during which the Contractor is delayed in said work by Acts of God, or by stormy or inclement weather, or by any reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof.

“(d) Damages for Delay.—The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the con-

tract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances, and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

Plaintiff denies each and every allegation in said paragraph inconsistent with the provision of said contract quoted in this paragraph of this answer.

XI.

Answering the allegations of paragraph XIII of said cross-complaint, plaintiff denies all of the allegations contained in the first four lines of said paragraph; denies that the resulting, or any loss, or inconvenience, or delay in opening said project to use as a public highway is exceedingly [58] great, or is great at all, and denies that any such loss is imprac-

licable of exact ascertainment or that it exceeds \$500.00 per day or any other sum of money whatever and in this connection plaintiff alleges that defendant has suffered no loss through any delay in completing said project which may not be exactly ascertained.

Further answering the allegations contained in said paragraph, plaintiff denies that it abandoned said contract, or the work to be done thereunder, or that there was necessary any delay in letting new contracts, or that because of delay in completing the work defendant has been, or will be, required to maintain a large, or any, staff of engineers or other employees, or any engineers, or employees whatever, or keep an active District organization intact at a reasonable, or other, cost to said defendant of \$288.00 per day, or any other sum of money whatever; denies that on completion of the project of defendant all such costs will be eliminated; denies that any expense of defendant results, or has resulted, solely, or otherwise, from any delay caused by plaintiff's default or any delay caused by plaintiff at all in the performance of said contract, or otherwise, or at all; denies that defendant must, or will, pay interest on any bonds referred to in said cross-complaint, or otherwise, for the period of 433 days, or for any period of time whatsoever on account of any delay caused by any default of plaintiff, or otherwise caused by plaintiff, in the amount of \$82,000.00 or in any other amount whatsoever; denies that there was any delay in the construction of said project caused by any default of plaintiff.

Plaintiff denies all of the allegations contained in lines 10 to 12 inclusive, on page 38, of said cross-complaint.

XII.

Answering the allégations contained in paragraph XIV of the cross-complaint denies each and all, generally and specifically the allegations in said paragraph contained. [59]

For a second, separate and further defense to said cross-complaint, plaintiff alleges:

I.

That heretofore and on or about the 4th day of May, 1934, defendant advertised for bids to be made to it for the construction of the project described in the answer and cross-complaint, and invited bidders to submit bids therefor based upon the notice to bidders, plans, specifications and geological report furnished to bidders or made available to bidders in connection with any bid made; and that pursuant to said notice to bidders and based upon the representations to bidders contained in the plans and specifications and geological report, plaintiff submitted a bid for the doing of the work described in the notice to bidders aforesaid.

Thereafter the bid of plaintiff was duly accepted and a contract in writing entered into between plaintiff and defendant pursuant to the bid made by plaintiff, to which contract reference is hereby made for a full statement of the details thereof, and to the documents referred to therein for a full state-

ment of the details of same, with the same force and effect as if same were set forth in this answer, it being impracticable to fully set forth true copies of said contract and all documents referred to in the notice to bidders, plans and specifications as a part of this answer, and same being readily available in the records of defendant, which is a public corporation.

Plaintiff was induced to bid, and did bid solely upon the representations contained in the plans, specifications and geological report to which the attention of bidders was invited; and plaintiff relied upon all the representations therein contained in making its bid and in entering into a contract with the defendant pursuant to such bid, and would not have made said bid or entered into such contract, except for the [60] representations contained in the plans, specifications and geological report.

II.

That in and by the plans and specifications, and the geological report it was represented by defendant to plaintiff that the tunnels described therein would be driven through ground which was self-supporting in character for ninety percent or more of the total length of said tunnels, and which could be constructed and would be required to be constructed with the use only of temporary timber supports for the excavation of said tunnels which would be removed before the installation therein of the concrete lining or permanent structure thereof pro-

vided to be built therein under the plans and specifications.

That in truth and in fact said representations were false in that the entire length of the tunnels to be constructed was in ground which was not self-supporting, and which required permanent timbering or other support until and after the installation therein of the permanent concrete lining or structure thereof, and required all of the support placed therein prior to permanent lining to remain without removal from said tunnels.

III.

After entering into said contract with defendant, as aforesaid, plaintiff commenced work thereunder, and undertook the construction of said tunnels under and in accordance with the plans and specifications and in the belief that the representations contained in the plans and specifications and the geological report were true and correct. As the construction of said tunnels progressed, plaintiff found that the ground through which same were being driven was not self-supporting, and that all temporary support for the excavation for same was required of necessity to remain permanently. [61]

IV.

By reason of the character of ground encountered in the excavation and construction of said tunnels as aforesaid, plaintiff was necessarily required to and did expend large sums of money for labor to excavate and construct said tunnels in excess of that which would have been spent by plaintiff in the

event the construction of same could have been performed in accordance with the representations made as aforesaid, and also was compelled to and did expend large sums for materials and for the proper prosecution of the work in excess of what would otherwise have been necessary.

V.

It was never within the contemplation of said contract or of the parties to it that said tunnels should be constructed in said manner or through ground of the character and type actually encountered and plaintiff was not, therefore, obligated or required by said contract to so construct said tunnels and is entitled to recover from defendant the reasonable value of the work done by it in constructing said tunnels and a reasonable profit.

VI.

That for the reason, among others, that the condition of said ground had been misrepresented by defendant to plaintiff, as hereinbefore stated and that the work of constructing said tunnels was so radically different from that required by the contract, plaintiff, on June 13th, 1936, rescinded said contract and delivered to defendant the notice of rescission a copy of which is set forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Upon said delivery of said notice of rescission plaintiff ceased all work on said project and has not since [62] performed any work thereon and said contract thereupon was rescinded.

For a third and further and separate defense to said cross-complaint, plaintiff alleges:

I.

Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to VI, inclusive, of its second defense hereinabove in this answer set forth.

II.

The ground condition aforesaid was understood by both plaintiff and defendant and contemplated by both of them to be in accordance with the plans and specifications and the representations contained therein and in the geological report referred to therein; and said contract was entered into in the contemplation by both parties that self-supporting ground would be encountered in the excavation and construction of the tunnels for ninety per cent, or more, of the length thereof, all as hereinbefore alleged; and each party to said contract was mistaken as to the true facts; and by reason of such mistake plaintiff was relieved of any obligation further to perform said contract, and was entitled to rescind and did rescind same in accordance with its notification to defendant to that effect on June 13th, 1936.

For a fourth and further and separate defense to said cross-complaint, plaintiff alleges:

I.

Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to

VI, inclusive of its second defense hereinabove in this answer set forth. [63]

II.

That plaintiff was ignorant of, and mistaken as to, the ground condition to be encountered in the construction of the tunnels as aforesaid at the time it entered into said contract with defendant; but defendant, so plaintiff is informed and believes and therefore alleges, had knowledge of facts and circumstances from which it knew or should or could have known or suspected at said time that the ground through which the tunnels would be driven was not in fact self-supporting either for ninety per cent of the length of the said tunnels, or any part thereof, but was in truth and in fact not self-supporting for the entire length of said tunnels. That defendant falsely and fraudulently failed and neglected to inform and acquaint plaintiff with such facts and circumstances. For said reasons plaintiff entered into said contract with defendant solely by reason of the fraud of defendant as hereinbefore stated, and by reason of such fraud plaintiff was relieved of any obligation further to perform said contract and was entitled to rescind same in accordance with its notification to defendant to that effect on June 13th, 1936.

For a fifth and further and separate defense to said cross-complaint, plaintiff alleges:

I.

Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to

VI, inclusive, of its second defense hereinabove in this answer set forth.

II.

By reason of the difference in ground conditions [64] encountered in the construction of said tunnels as aforesaid, and of the radically different character of the work required to be done by plaintiff under the contract as a result of such different ground condition, the doing, performance or construction of the work contracted for under the contract, plans and specifications became and was in fact impossible in that the facts and premises upon which said contract was based were of a character that the assumed work to be done and conditions to be found turned out not to exist, and thereby plaintiff was called upon to and did work of such different character to that contemplated that in truth and in fact no contract ever existed for the work done by plaintiff.

For a sixth, separate and further defense to said cross-complaint, plaintiff alleges:

I.

In said contract dated June 4th, 1934, between plaintiff and defendant, referred to in plaintiff's second defense, it is provided that the District Engineer of defendant would give plaintiff sufficient points and lines to enable plaintiff to construct said project in accordance with said contract and said plans and specifications and that defendant would

set sufficient points to line and grade for plaintiff to work to.

II.

Shortly after the commencement of construction operations under said contract, and repeatedly thereafter, plaintiff demanded of the then duly appointed and acting District Engineer of defendant and of defendant that said Engineer set the necessary points and determine the necessary [65] lines to enable plaintiff to construct said project as required by said contract. That notwithstanding said demands of plaintiff said Engineer failed and refused, and has at all times failed and refused, to set said points, or establish said lines, or any of them, and the refusal of said Engineer so to do was ratified and approved by defendant.

III.

Said refusal of said Engineer and defendant to establish said lines and set said points is, and was, a breach of said contract and for that reason, among others, plaintiff, on June 13th, 1936, delivered to defendant the notice of rescission of said contract referred to in plaintiff's second defense and rescinded said contract.

For a seventh, separate and further defense to said cross-complaint, plaintiff alleges:

I.

Said contract, dated June 4th, 1934, between plaintiff and defendant, referred to in plaintiff's second defense herein provides, in part, as follows:

“(b) Completion of Work.—The time of completion of the entire work specified herein shall be within a period of seven hundred and twenty (720) calendar days from the date of the execution of the contract by the Board of Directors.

“(c) Extension of Time.—The time during which the Contractor is delayed in said work by Acts of God, or by stormy or inclement weather, or by any reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof.”

Said contract further purports to provide that plaintiff will pay to defendant as liquidated damages the amount of \$500.00 per day for each and every working day that elapses between the [66] limiting date provided in the contract and the date of actual completion of the work.

Said contract further provides, in part, as follows:

“7. Payments for said work will be made only upon the certificate of the District Engineer for work actually performed. The District Engineer shall measure the work on or about the first day of each month and at the time of completion of the entire work, and shall render a certificate on or about the tenth day of each month and

at the completion of the entire work, stating the amount of work performed during the previous calendar month, and during the current month, at the time of completion. The Contractor shall then, at the times above specified, be entitled to receive a payment from the District in an amount to be determined as follows: Until the total value of the work done since commencement of performance of the contract exceeds Four Hundred Thousand Dollars (\$400,000.00) the payment will be seventy-five per cent (75%) of the amount specified in the District Engineer's certificate; thereafter and until the total value of the work done since the commencement of performance of the contract equals One Million Dollars (\$1,000,000.00), the constant sum of One Hundred Thousand Dollars (\$100,000.00) will be retained by the District out of said total value; thereafter the progress payment will be ninety per cent (90%) of the amount specified in the Engineer's certificate, provided that no such estimate of payment shall be required to be made when, in the judgment of the District Engineer, the work is not proceeding in accordance with the provisions of the contract, or when, in his judgment, the total value of the work done since the last estimate amounts to less than Five Hundred Dollars (\$500.00), except the certificate and payment required at the completion of the entire work."

II.

Said contract was executed by the Board of Directors of defendant on June 4th, 1934.

III.

On June 10th, 1935, plaintiff applied to defendant in writing for an extension of time within which to complete the work.

By letter dated July 12th, 1935, addressed to plaintiff, defendant denied said request for an extension of time.

By letter dated July 26th, 1935, from plaintiff to defendant, plaintiff protested said denial and re-affirmed its request for such extension.

By letter to defendant dated August 28th, 1935, plaintiff [67] again demanded an extension of time sufficient to enable it to complete the work.

By letter to defendant dated May 8th, 1936, plaintiff again made written application for an extension of time.

By letter from defendant to plaintiff dated May 14th, 1936, defendant denied said request for an extension of time.

In addition, plaintiff on many other occasions prior to May 24th, 1936, requested the District Engineer of defendant and requested defendant to grant to plaintiff an extension of time within which to complete construction of said project for such reasonable period as might be required and to which plaintiff was entitled, all of which said requests were denied.

IV.

Plaintiff was unavoidably delayed in the performance of said work for a period of at least 340 days by the following causes:

1. The work was delayed by stormy and inclement weather.

2. The work was delayed by a general strike in the San Francisco Bay area.

3. The work was delayed by the character of the ground encountered which was totally different from that represented by the contract and geological report.

4. The work was delayed because it was physically impossible to construct said tunnels in the ground encountered in the manner contemplated by the contract and a much slower and more expensive method of construction was necessary.

5. The work was delayed by the matters and things particularly set forth and alleged in paragraphs I to V, inclusive, of plaintiff's second defense hereinabove in this answer set forth and plaintiff refers to and incorporates said paragraphs of said second defense as a part [68] of this defense.

6. The work was delayed because of the inadequate and unsafe design of the tunnel.

7. The work was delayed by additional work required to be done which was not included in, or contemplated by, the contract, plans and specifications.

8. The work was delayed by slides and by the tunnels caving in, the necessity of reexcavating

and retimbering the caved in portions, the necessity of resetting timbers and moving them back where pressure of the ground had forced them out of alignment and by changes in the design for lining a part of the tunnels.

9. The work was delayed by conditions which arose due to the nature of the ground, which endangered the lives of workmen.

10. The work was delayed by orders of the Industrial Accident Commission of California stopping and suspending all work.

11. The work was delayed through failure of defendant and the District Engineer of defendant to perform their obligations under the contract and in particular in failing to furnish to plaintiff lines and grades to which to work.

12. The work was delayed by orders of said Engineer stopping and suspending work.

13. The work was delayed by other causes not the fault of plaintiff and over which it had no control.

None of said causes of delay were due to any fault of plaintiff and over none of them did it have any control.

Said Engineer and defendant knew the condition of the [69] ground which had been encountered and knew of the existence of the causes for the delays.

•
V.

When plaintiff filed with defendant said requests for said extensions of time, neither said District

Engineer of defendant nor defendant granted, or have ever granted, to plaintiff a hearing thereon, or given to plaintiff any opportunity properly or at all to present same, but have arbitrarily, capriciously and fraudulently, knowing that plaintiff was entitled to extensions of time, denied the same.

Plaintiff is informed and believes and therefore alleges that said Engineer has failed to consider whether plaintiff was entitled to an extension of time and has failed to exercise his judgment as to whether the work was unavoidably delayed and has failed to perform his duties and obligations under said contract and that if he did act in any way on said requests for said extensions of time, such action was arbitrary, capricious and fraudulent and not based on the facts or his knowledge of the conditions which caused the delays.

Plaintiff is further informed and believes and therefore alleges that said District Engineer did not act on said requests of plaintiff for said extensions of time at all, but that they were denied by defendant without reference to the opinion or judgment of said Engineer.

VI.

Said District Engineer on or about the 1st day of June, 1936, measured the work which plaintiff had done under its said contract during the month of May, 1936, and on the 10th day of June, 1936, delivered an estimate to this plaintiff stating the amount of work performed by plaintiff during the month of May, 1936, and which said estimate stated

that plaintiff was entitled to be paid by defendant for said work the amount of \$152,086.98. [70]

The estimates theretofore made by defendant stated that the total value of the work at said time done and performed by plaintiff in and about the performance of said project since the commencement of the performance of the contract by plaintiff exceeded the sum of \$2,000,000.00.

Defendant also, at the time of the delivery by it to plaintiff of said above referred to estimate, delivered to this plaintiff its check, for the work done by said plaintiff during the month of May, 1936, in the sum of \$148,586.98, and no more, and defendant has not paid or offered to pay to plaintiff any other or further amount or sum than that specified in said check for or on account of said progress payment so due and payable on the 10th day of June, 1936.

Defendant withheld from plaintiff a penalty of \$500.00 per day for all days after May 24th, 1936, including non-working days, in making tender to plaintiff of the money due it under the contract for work done by plaintiff during said month of May, the total of such penalty withheld being \$3,500.00, including \$500.00 for a legal holiday and Sunday, a non-working day; and plaintiff is informed and believes and therefore alleges the fact to be that defendant intended to and would have withheld similarly \$500.00 per day from any and all payments which might thereafter become due to plaintiff until the completion of the performance by plaintiff of the work of construction of said project; and that

the total amount which would have been so withheld by defendant from progress payments due and to become due to plaintiff would have been the sum of not less than \$120,000.00.

By reason of the matters and things hereinbefore in this paragraph referred to and by reason of its failure to make and pay to plaintiff the full amount of said progress payment in the sum of \$152,086.98 then due and payable, defendant breached its said contract with plaintiff in a substantial and material respect. [71]

For said reasons the consideration for plaintiff's obligation under said contract then and there failed in part, in the failure and refusal of said defendant, as aforesaid, to pay and in not paying to this plaintiff the amount and sum of money estimated by said defendant to be due and payable to this plaintiff for work done by it under said contract for and during the month of May, 1936, and according to the estimate of said District Engineer, as provided in said contract.

Further, the consideration for said contract then and there failed in a material respect in the failure and refusal of said defendant to pay to plaintiff the amount and sum of money estimated by said defendant to be due and payable to this plaintiff for work and labor done and performed by it under said contract for the month of May, 1936, under the terms of said estimate of said District Engineer, and in failing and refusing to grant to this plaintiff any extension of time whatsoever, as hereinbefore stated,

and in deducting the sum of \$3,500.00 as a penalty under said contract for failure to complete the same within said contract period.

VII.

For the reason, among others, that defendant failed and refused to grant to plaintiff the extension of time to which it was entitled and failed and refused to pay to plaintiff the progress payments due and owing to it under said contract, plaintiff on June 13th, 1936, rescinded said contract and delivered to defendant the notice of rescission, a copy of which is set forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Upon said delivery of said notice of rescission plaintiff ceased all work on said project and has not since performed any work thereon and said contract was thereupon rescinded. [72]

For an eighth and further and separate defense to said cross-complaint, plaintiff alleges:

I.

Plaintiff here repeats and incorporates herein as a part of this defense the allegations of paragraphs I to V, inclusive, of its second defense hereinabove in this answer set forth.

II.

Plaintiff was ignorant of ground conditions encountered in the construction of the tunnels at the time it entered into said contract with defendant

and plaintiff could not have determined or ascertained the true condition of the ground to be encountered prior to the submission of its said bid to defendant or prior to the execution of said contract, but was forced to and did in fact rely upon the representations obtained from the specifications and geological report therein referred to and plaintiff was misled thereby and was therefore mistaken as to the true condition of the ground; but defendant, so plaintiff is informed and believes and therefore alleges, had knowledge of facts and circumstances from which it knew or should or could have known or suspected at said time that the ground through which the tunnels would be driven was not in fact self-supporting either for ninety per cent of the length of the said tunnels, or any part thereof, but was in truth and in fact not self-supporting for the entire length of said tunnels. That defendant falsely and fraudulently failed and neglected to inform and acquaint plaintiff with such facts and circumstances. For said reasons plaintiff entered into said contract with defendant solely by reason of the mistaken belief of plaintiff as to the said ground conditions and by reason of the inability of plaintiff to ascertain the true ground conditions and by reason of the fraud of defendant as hereinbefore stated and for said reasons plaintiff was relieved of any obligation further to perform said contract and was entitled to rescind and did rescind same in accord-[73] ance with its notification to defendant to that effect on June 13th, 1936, a copy of which is set

forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Wherefore, plaintiff and cross-defendant prays that defendant and cross-complainant take nothing by its cross-complaint and that plaintiff have judgment in accordance with the prayer of its complaint on file herein.

THELEN & MARRIN,
EUGENE E. TREFETHEN,
DeLANCEY C. SMITH,
J. PAUL ST. SURE,

Attorneys for plaintiff and
cross-defendant.

Receipt of a copy of the within Answer to Cross-Complaint this day of February, 1937, is hereby admitted.

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,

Attorneys for defendant and
cross-complainant. [74]

State of California,
County of Alameda—ss.

Henry J. Kaiser, being first duly sworn, deposes and says:

That the plaintiff and cross-defendant named in the foregoing Answer to Cross-Complaint is a corporation; that affiant is an officer, to-wit, the presi-

dent of said corporation and as such is authorized to and does make this verification for and on behalf of said corporation; that affiant has read said Answer to Cross-Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters which are therein stated on information and belief and as to those matters he believes it to be true.

HENRY J. KAISER.

Subscribed and sworn to before me this 10th day of February, 1937.

[Notarial Seal] PAUL E. ROGERS,
Notary Public

in and for the County of Alameda,
State of California.

[Endorsed]: Filed Feb. 10, 1937. [75]

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

[76]

Come now cross-defendants, Hartford Accident and Indemnity Company, Fidelity and Deposit Company of Maryland, The Aetna Casualty and Surety Company, Indemnity Insurance Company of North America, American Surety Company of New York, Fireman's Fund Indemnity Company, Maryland Casualty Company, United States Fidelity and Guaranty Company, The Fidelity and Casualty Company of New York, Glens Falls Indemnity

Company, Standard Surety and Casualty Company of New York, Standard Accident Insurance Company, Pacific Indemnity Company, Massachusetts Bonding and Insurance Company, Continental Casualty Company, and New Amsterdam Casualty Company, corporations, and answering the cross-complaint of defendant and cross-complainant, Joint Highway District No. 13 of the State of California, a public corporation, on file herein, said cross-defendants admit, deny and allege as follows:

I.

Answering paragraph IV of said cross-complaint, said cross-defendants deny generally and specifically, all and singular the allegations in said paragraph contained except that said cross-defendants admit that a contract in writing was entered into between plaintiff and defendant herein on the 4th day of June, 1934.

II.

Answering paragraph VI of said cross-complaint, said cross-defendants deny generally and specifically, each and all the allegations thereof beginning with the words "upon which date", line 28, page 31, to and including the words "or any part thereof", line 31, page 31; and in this behalf cross-defendants are informed and believe and therefore allege that on June 13, 1936, plaintiff duly rescinded said contract of June 4, 1934, for good and sufficient reasons and in accordance with law, and that since said date plaintiff has done no work under said contract. [77]

III.

Answering paragraph VII of said cross-complaint, said cross-defendants deny generally and specifically, each and all the allegations in said paragraph contained, except that said cross-defendants admit that they and each of them received from cross-complainant a copy of a notice in the form stated in said paragraph.

IV.

Answering paragraph VIII of said cross-complaint, said cross-defendants admit that they have not and none of them has done any work under said contract and that plaintiff has done no work under said contract since rescinding said contract on June 13, 1936. and deny generally and specifically each and every other allegation in said paragraph contained.

V.

Answering paragraph IX of said cross-complaint, said cross-defendants allege that they have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations of said paragraph, and therefore and placing their denial upon that ground deny each and every allegation in said paragraph contained, except that said cross-defendants deny that plaintiff abandoned said contract at any time.

VI.

Answering paragraph X of said cross-complaint, said cross-defendants allege that they have no in-

formation or belief upon the subject sufficient to enable them, or any of them, to answer the allegations of said paragraph, and therefore and placing their denial upon that ground deny each and every allegation in said paragraph contained. [78]

VII.

Answering paragraph XI of said cross-complaint, said cross-defendants allege that they have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations of said paragraph, and therefore and placing their denial upon that ground deny each and every allegation in said paragraph contained.

VIII.

Answering paragraph XII of said cross-complaint, said cross-defendants allege that said contract between plaintiff and cross-defendant and defendant and cross-complainant provides as follows:

“Section 4. Time

“(a) Commencement of Work.—The Contractor shall commence work within ten (10) days after the execution of the contract for the work by the Board of Directors and shall continue without interruption unless otherwise directed by the District. At least three (3) days before starting, the Contractor shall notify the District Engineer in writing of the date that work is to commence.

“(b) Completion of Work.—The time of completion of the entire work specified herein shall

be within a period of seven hundred and twenty (720) calendar days from the date of the execution of the contract by the Board of Directors.

“(c) Extension of Time.—The time during which the Contractor is delayed in said work by Acts of God, or by stormy or inclement weather, or by any reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof.

“(d) Damages for Delay. — The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District [79] as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly

stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

and cross-defendants deny each and every allegation in said paragraph inconsistent with the above quoted provisions of said contract.

IX.

Answering paragraph XIII of said cross-complaint, said cross-defendants allege that they have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations of said paragraph, and therefore and placing their denial upon that ground deny each and every allegation in said paragraph contained, except that said cross-defendants deny that plaintiff abandoned said contract and/or that there was any delay in the construction of said project caused by the alleged or any default of plaintiff.

X.

Said cross-defendants deny generally and specifically, all and singular, each and every allegation contained in paragraph XIV of said cross-complaint; and deny that defendant and cross-complainant has suffered and/or sustained damages or any

damage in the aggregate amount of \$341,557.84, or in any sum or amount or at all.

XI.

Further answering said cross-complaint, said cross- [80] defendants allege that the contract between plaintiff and defendant provided that upon discontinuance of the contract by plaintiff before completion defendant and cross-complainant should, in the manner provided in said contract, proceed with the completion thereof and that in case the expense of completion

“is less than the sum which would have been payable under this contract, if the same had been completed by the said second party (plaintiff), the said second party shall be entitled to receive the difference, and in case such expense shall exceed the last said amount, then the said second party or its bondsmen shall pay the amount of such excess to the first party on notice from the said first party (defendant and cross-complainant) of the excess so due”

and cross-defendants allege that at the time of the filing of said cross-complaint the expense of completion of said contract as in said contract provided had not been determined; that at the time of the filing of said cross-complaint, cross-defendant did not have a cause of action against cross-defendants upon the alleged bond for the damages alleged, or any thereof, and that said cross-complaint at the time of filing was and is premature.

XII.

Further answering said cross-complaint and as a separate defense thereto, said cross-defendants allege that the contract between plaintiff and defendant and cross-complainant provided in paragraph 5 thereof that after abandonment or discontinuance in the performance thereof by plaintiff or after notice by defendant and cross-complainant to plaintiff to discontinue, defendant and cross-complainant "shall thereupon have the power to place such and so many persons, and to obtain by contract, purchase or hire, such animals, carts, wagons, implements, tools, material or materials, by contract or otherwise, as said first party may deem advisable, to work at and be used to complete the work herein described, or such part thereof as the agent authorized to superintend the same may deem [81] necessary, and to use such material as they may find upon the line of said work and to charge the expense of such labor and material, animals, carts, wagons, implements and tools to the second party, and the expense so charged shall be deducted and paid by the first party out of such moneys as may be either due or may at any time thereafter become due to the said second party under and by virtue of this contract or any part thereof."

that defendant and cross-complainant did not proceed with the completion of said contract after the alleged abandonment of the work thereunder by plaintiff in the manner provided in said contract,

but proceeded with the completion thereof in a manner contrary to and in violation of the terms, conditions and provisions of said contract; and that by reason of said breach of said contract by defendant and cross-complainant, said answering cross-defendants are and each of them is relieved of any and all liability to defendant and cross-complainant under the alleged bond for and on account of the items of damage and each and all thereof alleged in said cross-complaint.

XIII.

Further answering said cross-complaint, and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. That heretofore and on or about the 4th day of May, 1934, defendant advertised for bids to be made to it for the construction of the project described in the answer and cross-complaint, and invited bidders to submit bids therefor based upon the notice to bidders, plans, specifications and geological report furnished to bidders or made available to bidders in connection with any bid made; and that pursuant to said notice to bidders and based upon the representations to bidders contained in the plans and specifications and geological report, plaintiff submitted a bid for the doing of the work described [82] in the notice to bidders aforesaid.

Thereafter the bid of plaintiff was duly accepted and a contract in writing entered into between plain-

tiff and defendant pursuant to the bid made by plaintiff, to which contract reference is hereby made for a full statement of the details thereof, and to the documents referred to therein for a full statement of the details of same, with the same force and effect as if same were set forth in this answer, it being impracticable to fully set forth true copies of said contract and all documents referred to in the notice to bidders, plans and specifications as a part of this answer, and same being readily available in the records of defendant, which is a public corporation.

Plaintiff was induced to bid, and did bid solely upon the representations contained in the plans, specifications and geological report to which the attention of bidders was invited; and plaintiff relied upon all the representations therein contained in making its bid and in entering into a contract with the defendant pursuant to such bid, and would not have made said bid or entered into such contract, except for the representations contained in the plans, specifications and geological report.

2. That in and by the plans and specifications and the geological report it was represented by defendant to plaintiff that the tunnels described therein would be driven through ground which was self-supporting in character for ninety per cent or more of the total length of said tunnels, and which could be constructed and would be required to be constructed with the use only of temporary timber supports for the excavation of said tunnels which would be removed before the installation therein of the

concrete lining or permanent structure thereof provided to be built therein under the plans and specifications. [83]

That in truth and in fact said representations were false in that the entire length of the tunnels to be constructed was in ground which was not self-supporting, and which required permanent timbering or other support until and after the installation therein of the permanent concrete lining or structure thereof, and required all of the support placed therein prior to permanent lining to remain without removal from said tunnels.

3. After entering into said contract with defendant, as aforesaid, plaintiff commenced work thereunder, and undertook the construction of said tunnels under and in accordance with the plans and specifications and in the belief that the representations contained in the plans and specifications and the geological report were true and correct. As the construction of said tunnels progressed, plaintiff found that the ground through which same were being driven was not self-supporting, and that all temporary support for the excavation for same was required of necessity to remain permanently.

4. By reason of the character of ground encountered in the excavation and construction of said tunnels as aforesaid, plaintiff was necessarily required to and did expend large sums of money for labor to excavate and construct said tunnels in excess of that which would have been spent by plaintiff in the event the construction of same could have been per-

formed in accordance with the representations made as aforesaid, and also was compelled to and did expend large sums for materials and for the proper prosecution of the work in excess of what would otherwise have been necessary.

5. It was never within the contemplation of said contract or of the parties to it that said tunnels should be constructed in said manner or through ground of the character and type [84] actually encountered and plaintiff was not, therefore, obligated or required by said contract to so construct said tunnels and is entitled to recover from defendant the reasonable value of the work done by it in constructing said tunnels and a reasonable profit.

6. That for the reason, among others, that the condition of said ground had been misrepresented by defendant to plaintiff, as hereinbefore stated, and that the work of constructing said tunnels was so radically different from that required by the contract, plaintiff, on June 13th, 1936, rescinded said contract and delivered to defendant the notice of rescission, a copy of which is set forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Upon said delivery of said notice of rescission plaintiff ceased all work on said project and has not since performed any work thereon and said contract thereupon was rescinded.

XIV.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-

defendants are informed and believe and therefore allege:

1. Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to VI, inclusive, of its second defense hereinabove in this answer set forth.

2. The ground condition aforesaid was understood by both plaintiff and defendant and contemplated by both of them to be in accordance with the plans and specifications and the representations contained therein and in the geological report referred to therein; and said contract was entered into in the contemplation by both parties that self-supporting ground would be encountered [85] in the excavation and construction of the tunnels for ninety per cent, or more, of the length thereof, all as hereinbefore alleged; and each party to said contract was mistaken as to the true facts; and by reason of such mistake plaintiff was relieved of any obligation further to perform said contract, and was entitled to rescind and did rescind same in accordance with its notification to defendant to that effect on June 13th, 1936.

XV.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to VI, inclusive, of its second defense hereinabove in this answer set forth.

2. That plaintiff was ignorant of, and mistaken as to, the ground condition to be encountered in the construction of the tunnels as aforesaid at the time it entered into said contract with defendant; but defendant, so plaintiff is informed and believes and therefore alleges, had knowledge of facts and circumstances from which it knew or should or could have known or suspected at said time that the ground through which the tunnels would be driven was not in fact self-supporting either for ninety per cent of the length of the said tunnels, or any part thereof, but was in truth and in fact not self-supporting for the entire length of said tunnels. That defendant falsely and fraudulently failed and neglected to inform and acquaint plaintiff with such facts and circumstances. For said reasons plaintiff entered into said contract with defendant solely by reason of the fraud of defendant as hereinbefore stated, and by reason of such fraud plaintiff was relieved of any obligation further to perform said [86] contract and was entitled to rescind same in accordance with its notification to defendant to that effect on June 13th, 1936.

XVI.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. Plaintiff here repeats and incorporates as a part of this defense the allegations of paragraphs I to VI, inclusive, of its second defense hereinabove in this answer set forth.

2. By reason of the difference in ground conditions encountered in the construction of said tunnels as aforesaid, and of the radically different character of the work required to be done by plaintiff under the contract as a result of such different ground condition, the doing, performance or construction of the work contracted for under the contract, plans and specifications became and was in fact impossible in that the facts and premises upon which said contract was based were of a character that the assumed work to be done and conditions to be found turned out not to exist, and thereby plaintiff was called upon to and did work of such different character to that contemplated that in truth and in fact no contract ever existed for the work done by plaintiff.

XVII.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. In said contract dated June 4th, 1934, between plaintiff and defendant, referred to in plaintiff's second defense, it is provided that the District Engineer of defendant would give plaintiff sufficient points and lines to enable plaintiff to construct said project in accordance with said contract and said [87] plans and specifications and that defendant would set sufficient points to line and grade for plaintiff to work to.

2. Shortly after the commencement of construction operations under said contract, and repeatedly

thereafter, plaintiff demanded of the then duly appointed and acting District Engineer of defendant and of defendant that said Engineer set the necessary points and determine the necessary lines to enable plaintiff to construct said project as required by said contract. That notwithstanding said demands of plaintiff said Engineer failed and refused, and has at all times failed and refused, to set said points, or establish said lines, or any of them, and the refusal of said Engineer so to do was ratified and approved by defendant.

3. Said refusal of said Engineer and defendant to establish said lines and set said points is, and was, a breach of said contract and for that reason, among others, plaintiff, on June 13th, 1936, delivered to defendant the notice of rescission of said contract referred to in plaintiff's second defense and rescinded said contract.

XVIII.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. Said contract, dated June 4th, 1934, between plaintiff and defendant, referred to in plaintiff's second defense herein provides, in part, as follows:

“(b) Completion of Work.—The time of completion of the entire work specified herein shall be within a period of seven hundred and twenty (720) calendar days from the date of the

execution of the contract by the Board of Directors.

“(c) Extension of Time.—The time during which the Contractor is delayed in said work by Acts of God, or by stormy or inclement weather, or by any [88] reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof.”

Said contract further purports to provide that plaintiff will pay to defendant as liquidated damages the amount of \$500.00 per day for each and every working day that elapses between the limiting date provided in the contract and the date of actual completion of the work.

Said contract further provides, in part, as follows:

“7. Payments for said work will be made only upon the certificate of the District Engineer for work actually performed. The District Engineer shall measure the work on or about the first day of each month and at the time of completion of the entire work, and shall render a certificate on or about the tenth day of each month and at the completion of the entire work, stating the amount of work performed during

the previous calendar month, and during the current month, at the time of completion. The Contractor shall then, at the times above specified, be entitled to receive a payment from the District in an amount to be determined as follows: Until the total value of the work done since commencement of performance of the contract exceeds Four Hundred Thousand Dollars (\$400,000.00) the payment will be seventy-five per cent (75%) of the amount specified in the District Engineer's certificate; thereafter and until the total value of the work done since the commencement of performance of the contract equals One Million Dollars (\$1,000,000.00), the constant sum of One Hundred Thousand Dollars (\$100,000.00), will be retained by the District out of said total value thereafter the progress payment will be ninety per cent (90%) of the amount specified in the Engineer's certificate, provided that no such estimate of payment shall be required to be made when, in the judgment of the District Engineer, the work is not proceeding in accordance with the provisions of the contract, or when, in his judgment, the total value of the work done since the last estimate amounts to less than Five Hundred Dollars (\$500.00), except the certificate and payment required at the completion of the entire work."

2. Said contract was executed by the Board of Directors of defendant on June 4th, 1934. [89]

3. On June 10th, 1935, plaintiff applied to defendant in writing for an extension of time within which to complete the work.

By letter dated July 12th, 1935, addressed to plaintiff, defendant denied said request for an extension of time.

By letter dated July 26th, 1935, from plaintiff to defendant, plaintiff protested said denial and reaffirmed its request for such extension.

By letter to defendant dated August 28th, 1935, plaintiff again demanded an extension of time sufficient to enable it to complete the work.

By letter to defendant dated May 8th, 1936, plaintiff again made written application for an extension of time.

By letter from defendant to plaintiff dated May 14th, 1936, defendant denied said request for an extension of time.

In addition, plaintiff on many other occasions prior to May 24th, 1936, requested the District Engineer of defendant and requested defendant to grant to plaintiff an extension of time within which to complete construction of said project for such reasonable period as might be required and to which plaintiff was entitled, all of which said requests were denied.

4. Plaintiff was unavoidably delayed in the performance of said work for a period of at least 340 days by the following causes:

(1) The work was delayed by stormy and inclement weather.

(2) The work was delayed by a general strike in the San Francisco Bay area.

(3) The work was delayed by the character of the ground encountered which was totally different from that represented by the contract and geological report. [90]

(4) The work was delayed because it was physically impossible to construct said tunnels in the ground encountered in the manner contemplated by the contract and a much slower and more expensive method of construction was necessary.

(5) The work was delayed by the matters and things particularly set forth and alleged in paragraphs I to V, inclusive, of plaintiff's second defense hereinabove in this answer set forth and plaintiff refers to and incorporates said paragraphs of said second defense as a part of this defense.

(6) The work was delayed because of the inadequate and unsafe design of the tunnel.

(7) The work was delayed by additional work required to be done which was not included in, or contemplated by, the contract, plans and specifications.

(8) The work was delayed by slides and by the tunnels caving in, the necessity of reexcavating and retimbering the caved in portions, the necessity of resetting timbers and moving them back where pressure of the ground had forced them out of alignment and by changes in the design for lining a part of the tunnels.

(9) The work was delayed by conditions which arose, due to the nature of the ground, which endangered the lives of workmen.

(10) The work was delayed by orders of the Industrial Accident Commission of California stopping and suspending all work.

(11) The work was delayed through failure of defendant and the District Engineer of defendant to [91] perform their obligations under the contract and in particular in failing to furnish to plaintiff lines and grades to which to work.

(12) The work was delayed by orders of said Engineer stopping and suspending work.

(13) The work was delayed by other causes not the fault of plaintiff and over which it had no control.

None of said causes of delay were due to any fault of plaintiff and over none of them did it have any control.

Said Engineer and defendant knew the condition of the ground which had been encountered and know of the existence of the causes for the delays.

5. When plaintiff filed with defendant said requests for said extensions of time, neither said District Engineer of defendant nor defendant granted, or have ever granted, to plaintiff a hearing thereon, or given to plaintiff any opportunity properly or at all to present same, but have arbitrarily, capriciously and fraudulently, knowing that plaintiff was entitled to extensions of time, denied the same.

Plaintiff is informed and believes and therefore alleges that said Engineer has failed to consider

whether plaintiff was entitled to an extension of time and has failed to exercise his judgment as to whether the work was unavoidably delayed and has failed to perform his duties and obligations under said contract and that if he did act in any way on said requests for said extensions of time, such action was arbitrary, capricious and fraudulent and not based on the facts or his knowledge of the conditions which caused the delays.

Plaintiff is further informed and believes and therefore alleges that said District Engineer did not act on said requests [92] of plaintiff for said extensions of time at all, but that they were denied by defendant without reference to the opinion or judgment of said Engineer.

6. Said District Engineer on or about the 1st day of June, 1936 measured the work which plaintiff had done under its said contract during the month of May, 1936, and on the 10th day of June, 1936 delivered an estimate to this plaintiff stating the amount of work performed by plaintiff during the month of May, 1936, and which said estimate stated that plaintiff was entitled to be paid by defendant for said work the amount of \$152,086.98.

The estimates theretofore made by defendant stated that the total value of the work at said time done and performed by plaintiff in and about the performance of said project since the commencement of the performance of the contract by plaintiff exceeded the sum of \$2,000,000.00.

Defendant also, at the time of the delivery by it to plaintiff of said above referred to estimate, de-

livered to this plaintiff its check, for the work done by said plaintiff during the month of May, 1936, in the sum of \$148,586.98, and no more, and defendant has not paid or offered to pay to plaintiff any other or further amount or sum than that specified in said check for or on account of said progress payment so due and payable on the 10th day of June, 1936.

Defendant withheld from plaintiff a penalty of \$500.00 per day for all days after May 24th, 1936, including non-working days, in making tender to plaintiff of the money due it under the contract for work done by plaintiff during said month of May, the total of such penalty withheld being \$3,500.00, including \$500.00 for a legal holiday and Sunday, a non-working day; and plaintiff is informed and believes and therefore alleges the fact to be that [93] defendant intended to and would have withheld similarly \$500.00 per day from any and all payments which might thereafter become due to plaintiff until the completion of the performance by plaintiff of the work of construction of said project; and that the total amount which would have been so withheld by defendant from progress payments due and to become due to plaintiff would have been the sum of not less than \$120,000.00.

By reason of the matters and things hereinbefore in this paragraph referred to and by reason of its failure to make and pay to plaintiff the full amount of said progress payment in the sum of \$152,086.98 then due and payable, defendant breached its said

contract with plaintiff in a substantial and material respect.

For said reasons the consideration for plaintiff's obligation under said contract then and there failed in part, in the failure and refusal of said defendant, as aforesaid, to pay and in not paying to this plaintiff the amount and sum of money estimated by said defendant to be due and payable to this plaintiff for work done by it under said contract for and during the month of May, 1936, and according to the estimate of said District Engineer, as provided in said contract.

Further, the consideration for said contract then and there failed in a material respect in the failure and refusal of said defendant to pay to plaintiff the amount and sum of money estimated by said defendant to be due and payable to this plaintiff for work and labor done and performed by it under said contract for the month of May, 1936, under the terms of said estimate of said District Engineer, and in failing and refusing to grant to this plaintiff any extension of time whatsoever, as hereinbefore stated, and in deducting the sum of \$3,500.00 as a penalty under [94] said contract for failure to complete the same within said contract period.

7. For the reason, among others, that defendant failed and refused to grant to plaintiff the extension of time to which it was entitled and failed and refused to pay to plaintiff the progress payments due and owing to it under said contract, plaintiff

on June 13th, 1936, rescinded said contract and delivered to defendant the notice of rescission, a copy of which is set forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Upon said delivery of said notice of rescission plaintiff ceased all work on said project and has not since performed any work thereon and said contract was thereupon rescinded.

XIX.

Further answering said cross-complaint and as a separate defense thereto, said answering cross-defendants are informed and believe and therefore allege:

1. Plaintiff here repeats and incorporates herein as a part of this defense the allegations of paragraphs I to V, inclusive, of its second defense hereinabove in this answer set forth.

2. Plaintiff was ignorant of ground conditions encountered in the construction of the tunnels at the time it entered into said contract with defendant and plaintiff could not have determined or ascertained the true condition of the ground to be encountered prior to the submission of its said bid to defendant or prior to the execution of said contract, but was forced to and did in fact rely upon the representations obtained from the specifications and geological report therein referred to and plaintiff was misled thereby and was therefore mistaken as to the true condition of the ground; but defendant, so plaintiff is informed and believes and there-

fore alleges, had knowledge of facts and cir- [95] cumstances from which it knew or should or could have known or suspected at said time that the ground through which the tunnels would be driven was not in fact self-supporting either for ninety per cent of the length of the said tunnels, or any part thereof, but was in truth and in fact not self-supporting for the entire length of said tunnels. That defendant falsely and fraudulently failed and neglected to inform and acquaint plaintiff with such facts and circumstances. For said reasons plaintiff entered into said contract with defendant solely by reason of the mistaken belief of plaintiff as to the said ground conditions and by reason of the fraud of defendant as hereinbefore stated and for said reasons plaintiff was relieved of any obligation further to perform said contract and was entitled to rescind and did rescind same in accordance with its notification to defendant to that effect on June 13th, 1936, a copy of which is set forth in paragraph III of defendant's second, separate and further defense to the first count of the complaint herein.

Wherefore, said cross-defendants pray that defendant and cross-complainant take nothing by its cross-complaint and that said cross-defendants be hence dismissed with their costs.

REDMAN, ALEXANDER &
BACON

Attorneys for said Cross-
Defendant. [96]

State of California

City and County of San Francisco—ss.

Joy Lichtenstein, being first duly sworn, deposes and says: That he is an officer of the Hartford Accident and Indemnity Company, a corporation, one of the cross-defendants in the above entitled action, to wit: Vice-President, and as such is authorized to make this verification; that he has read the foregoing answer to cross-complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to such matters that he believes it to be true.

JOY LICHTENSTEIN

Subscribed and sworn to before me this 26 day of February, 1937.

[Seal]

DOROTHY H. McLENNAN

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 26, 1937. [97]

[Title of District Court and Cause.]

STIPULATION WAIVING JURY.

It Is Hereby Stipulated and Agreed by and between the parties hereto, represented by their respective attorneys herein, that a jury in the above-entitled action may be and the same is [98] hereby waived; and the Court is hereby requested to make

special findings of fact and conclusions of law upon all the issues raised by the pleadings herein.

Dated, February 24, 1938.

THELEN & MARRIN

EUGENE E. TREFETHEN

DE LANCEY C. SMITH

J. PAUL ST. SURE

Attorneys for Plaintiff

REDMAN, ALEXANDER &

BACON

*Attorneys for Cross-
Defendants.*

ARCHIBALD B. TINNING

T. P. WITTSCHEN

*Attorneys for Defendant and
Cross-Complainant.*

[Endorsed]: Filed Feb. 24, 1938. [99]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT.

Comes now plaintiff and by leave of Court first had and obtained files this amendment to the complaint on file herein.

Said complaint is amended by adding to the first cause of action set forth therein the following paragraph, to be numbered paragraph VI, to-wit:

VI.

At all times during the performance by plaintiff of such work and labor and the furnishing of said

materials to said defendant at its special instance and request plaintiff was a [100] duly licensed contractor under the laws of the State of California.

Said complaint is further amended by adding to the second cause of action set forth therein the following paragraph, to be numbered paragraph III, to-wit:

III.

Said work was done, labor performed and materials furnished to defendant at its special instance and request and at all times during the performance of all of said acts plaintiff was a duly licensed contractor under the laws of the State of California.

Dated: March 4th, 1938.

THELEN & MARRIN
EUGENE E. TREFETHEN
DeLANCEY C. SMITH
J. PAUL ST. SURE

Attorneys for plaintiff and
cross - defendants, Six Com-
panies of California. [101]

State of California,
City and County of San Francisco—ss:

Geo. T. Sloan, being first duly sworn, deposes and says:

That plaintiff named in the above and foregoing amendment to complaint is a corporation; that affiant is an officer, to-wit, Assistant Secretary of said

corporation and is authorized to, and does, make this verification for and on behalf of said corporation; that affiant has read the above and foregoing amendment to complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

GEO. T. SLOAN

Subscribed and sworn to before me this 4th day of March, 1938.

[Notarial Seal] LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California. [102]

Receipt of a copy of the foregoing amendment to complaint is hereby acknowledged this 5 day of March, 1938.

A. B. TINNING

T. P. WITTSCHEN

Attorneys for Defendant and
Cross-Complainant.

REDMAN, ALEXANDER &
BACON

Attorneys for Cross-Defendants
other than Plaintiff.

[Endorsed]: Filed Mar. 14, 1938. [103]

[Title of District Court and Cause.]

**AMENDMENT TO ANSWER OF PLAINTIFF
TO CROSS-COMPLAINT.**

Comes now plaintiff and cross-defendant Six Companies of California and by leave of Court first had and obtained files this amendment to its answer to the cross-complaint.

Paragraph II on page 2 of said answer is amended to read as follows:

II.

Answering the allegations contained in paragraph IV of the cross-complaint admits that a contract in writing was entered into between plaintiff and defendant which was dated June 4th, [104] 1934, but in that connection plaintiff is informed and believes and therefore alleges that said contract was not executed by the Board of Directors of defendant on June 4th, 1934, but was executed by said Board of Directors on June 14th, 1934. Plaintiff denies each and all of the remaining allegations in said paragraph contained, commencing with the word "wherein" on line 30 of page 30 of the cross-complaint, to and including the end of said paragraph on line 10 on page 31 of the cross-complaint.

Paragraph II of plaintiff's seventh defense to the cross-complaint, on page 14, is amended to read as follows:

II.

Said contract is dated June 4th, 1934, but plaintiff is informed and believes and therefore alleges

that said contract was executed by the Board of Directors of defendant on June 14th, 1934, and was not executed by said Board of Directors prior thereto.

Dated: March 4th, 1938.

THELEN & MARRIN
EUGENE E. TREFETHEN
DeLANCEY C. SMITH
J. PAUL ST. SURE

Attorneys for plaintiff and
cross - defendant, Six Com-
panies of California. [105]

State of California

City and County of San Francisco—ss.

Geo. T. Sloan, being first duly sworn deposes and says:

That plaintiff named in the above and foregoing amendment to answer of plaintiff to cross-complaint is a corporation; that affiant is an officer, to-wit, Assistant Secretary of said corporation and is authorized to, and does, make this verification for and on behalf of said corporation; that affiant has read the above and foregoing amendment to answer of plaintiff to cross-complaint and knows the contents thereof and that the same is true of his own knowledge except as to matters therein stated on information and belief and as to those matters he believes it to be true.

GEO. T. SLOAN

Subscribed and sworn to before me this 4th day of March, 1938.

[Notarial Seal] LULU P. LOVELAND
Notary Public in and for the City and County of
San Francisco, State of California. [106]

Receipt of a copy of the foregoing amendment to answer of plaintiff to cross-complaint is hereby acknowledged this 5 day of March, 1938.

A. B. TINNING

T. P. WITTSCHEN

Attorneys for Defendant and
Cross-Complainant.

REDMAN, ALEXANDER &
BACON

Attorneys for Cross-Defendants
other than Plaintiff.

[Endorsed]: Filed Mar. 14, 1938. [107]

[Title of District Court and Cause.]

AMENDMENT TO ANSWER OF CROSS-DEFENDANTS SURETY COMPANIES TO CROSS-COMPLAINT. [108]

Come now cross-defendants, Hartford Accident and Indemnity Company, Fidelity and Deposit Company of Maryland, The Aetna Casualty and Surety Company, Indemnity Insurance Company of North America, American Surety Company of New York, Fireman's Fund Indemnity Company, Maryland Casualty Company, United States Fi-

delity and Guaranty Company, The Fidelity and Casualty Company of New York, Glens Falls Indemnity Company, Standard Surety and Casualty Company of New York, Standard Accident Insurance Company, Pacific Indemnity Company, Massachusetts Bonding and Insurance Company, Continental Casualty Company, and New Amsterdam Casualty Company, corporations, and, by leave of Court first had and obtained, file this amendment to their answer to the cross-complaint herein.

Paragraph I on page 2 of said answer is amended to read as follows:

“I.

Answering paragraph IV of said cross-complaint, said cross-defendants deny generally and specifically, all and singular, the allegations in said paragraph contained except that said cross-defendants admit that a contract in writing was entered into between plaintiff and defendant herein which was dated June 4, 1934, but in that connection said cross-defendants are informed and believe and therefore allege that said contract was not executed by the Board of Directors of defendant on June 4, 1934 but was executed by said Board of Directors on June 14, 1934.”

Paragraph XVIII, Sub-division 2, page 14 of said cross-defendants' answer to the cross complaint is amended to read as follows: [109]

“2. Said contract is dated June 4, 1934 but cross-defendants are informed and believe and

therefore allege that said contract was executed by the Board of Directors of defendant and cross-complainant on June 14, 1934 and was not executed by said Board of Directors prior to said last mentioned date."

Dated: March 4, 1938.

REDMAN, ALEXANDER &
BACON

Attorneys for said Cross-
defendants. [110]

State of California

City and County of San Francisco—ss.

A. C. Posey, being first duly sworn, deposes and says: That he is Assistant Manager of the Hartford Accident and Indemnity Company, a corporation, one of the cross-defendants in the above entitled action, and as such is authorized to make this verification; that he has read the foregoing amendment to answer to cross-complaint and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon information or belief, and as to such matters that he believes it to be true.

A. C. POSEY

Subscribed and sworn to before me this 5th day of March, 1938.

[Seal]

ORAH M. NICHOLS

Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the foregoing Amendment to Answer to cross-complaint is hereby acknowledged this.....day of March, 1938.

THELEN & MARRIN

Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 14, 1938. [111]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of May, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of District Court and Cause.]

The parties hereto being present as heretofore the further trial hereof was thereupon resumed. George T. Sloan was sworn and testified on behalf of the plaintiff and the plaintiff rested. Mr. Wittschen made a motion to strike out certain evidence on the grounds stated, and after hearing the attorneys, it is Ordered that said motion stand submitted. Charles Derleth, Jr., and Wallace B. Boggs were sworn and testified on behalf of the defendant and thereupon the defendant rested its case on the right of the plaintiff to rescind the contract involved herein. Mr. Wittschen made and filed a mo-

tion for Special Findings and for Judgment in favor of the defendant on the right of plaintiff to rescind the contract involved herein. Mr. Marrin made a motion for judgment in favor of the plaintiff on the grounds stated and made a motion for Special Findings of Fact and Conclusions of Law in favor of the plaintiff on the grounds stated. After hearing the attorneys, it is Ordered that the further trial of this cause be and the same is hereby continued to Tuesday, May 31st, 1938 at ten o'clock a. m. [112]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 31st day of May, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of District Court and Cause.]

The parties hereto being present as heretofore, the further trial hereof was thereupon resumed. Mr. Marrin made and filed a motion to strike defendant's exhibits WWW and O-4 from the record on the grounds stated in the motion and Mr. Alexander joined in said motion on behalf of the cross-defendants Surety Companies, which said motion was ordered submitted. Mr. Marrin made and filed a

motion of Plaintiff for Special Findings of Fact and Conclusions of Law and for judgment in its favor, and thereupon Mr. Alexander joined in the motion. After hearing the attorneys for the respective parties, it is Ordered that the motion for judgment in favor of the defendant on the right of the plaintiff to rescind be and the same is hereby granted and that judgment be entered accordingly upon Special Findings of Fact and Conclusions of Law to be prepared by the defendant in accordance with Rule 42 of this Court. Thereupon Mr. Alexander made a motion for Special Findings of Fact and Conclusions of Law on all the issues involved herein. Wallace B. Boggs was recalled by the defendant. Mr. Alexander made a motion to dismiss the cross-complaint as to the cross-defendants Surety Companies on the grounds stated. Mr. Smith made a motion to dismiss the cross-complaint as to the cross-defendant Six Companies of California on the grounds stated. Ordered that defendant's motion to strike plaintiff's Exhibits 22 and 23 be granted and plaintiff and cross-defendants, Surety Companies allowed an exception. Ordered that the plaintiff's motion to strike defendants Exhibits WWW and O-4 from the record be denied and plaintiff and cross-defendants Surety Companies allowed an exception. After argument, it is Ordered that the motions to dismiss the cross complaint be and the same are hereby submitted. Ordered that the further trial hereof be and the same is hereby continued until 10 o'clock a. m. tomorrow. [113]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 1st day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of District Court and Cause.]

The parties hereto being present as heretofore the further trial of this cause was thereupon resumed. The motions to dismiss the cross-complaint having been heretofore submitted, it is, by the Court, Ordered that said motions be and the same are hereby denied and the cross-defendants be and they are hereby allowed an exception to the ruling of the Court. Wallace B. Boggs was recalled and further testified on behalf of the defendant on its cross-complaint. Mr. Tinning introduced in evidence and filed defendant's exhibits X-1 to X-115. Mr. Wittschen filed a Dismissal as to certain cross-defendants and made a motion to dismiss the cross-complaint as to certain cross-defendants, and after hearing had, it is Ordered that said motion be and the same is hereby granted and that the Cross-Complaint of the defendant and cross-complainant be and the same is hereby dismissed without prejudice as against cross-defendant Fireman's Fund Indemnity Company, a California Corporation and

Pacific Indemnity Company, a California corporation, only, and it is Ordered that an exception be noted to the ruling of the Court. Mr. Wittschen made a motion to amend the cross-complaint on the face thereof and after argument by the attorneys it is Ordered that said motion be and the same is hereby granted, and it is further ordered that said amendments be deemed to be denied by each of the cross-defendants. Ordered that the further trial hereof be continued until tomorrow at ten o'clock a. m. [114]

[Title of District Court and Cause.]

**DISMISSAL OF ACTION AS TO CERTAIN
CROSS-DEFENDANTS. [115]**

Defendant and Cross-Complainant Joint Highway District No. 13 of the State of California, a public corporation, hereby dismisses without prejudice its cross-complaint as against cross-defendants Fireman's Fund Indemnity Company, a California corporation, and Pacific Indemnity Company, a California corporation, only.

Dated: June 1, 1938.

**ARCHIBALD B. TINNING
T. P. WITTSCHEN**

**Attorneys for Defendant and
Cross-Complainant.**

[Endorsed]: Filed June 1, 1938. [116]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 2nd day of June, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of District Court and Cause.]

The parties hereto being present as heretofore the further trial hereof was thereupon resumed. Wallace B. Boggs was recalled and further testified on behalf of the defendant and cross-complaint. Mr. Tinning introduced in evidence and filed defendant's exhibit X-116. Joseph Barlow Lippincott and H. A. Van Norman were sworn and testified on behalf of the defendant and cross-complaint. Thereupon the defendant and cross-complainant rested and the evidence was closed. Mr. Wittschen on behalf of the defendant and cross-complainant made a motion for judgment in its favor and made a motion for special findings of fact and conclusions of law on its cross-complaint in its favor against the plaintiff and cross-defendant Six Companies of California and the several Surety Companies now before the Court. Mr. Smith on behalf of the plaintiff and cross-defendant Six Companies of California made a motion to strike out certain evidence and Mr. Alexander on behalf of the Surety Companies joined in said motion. Mr.

Marrin on behalf of the plaintiff and cross-defendant made and filed a motion for Special Findings of Fact and Conclusions of Law and for judgment in its favor on the counter-claims of the defendant; and made a motion on behalf of the plaintiff and cross-defendant Six Companies of California for Special Findings of Fact and Conclusions of Law and for Judgment in its favor on the cross-complaint of defendant and cross-complainant. Mr. Alexander on behalf of the cross-defendants Surety Companies made a motion for judgment in favor of said Surety Companies, on the grounds stated. After argument by Mr. Wittschen on behalf of the defendant and cross-complaint, it is Ordered that the further trial hereof be continued and the same is hereby continued until Tuesday, June 7, 1938, at ten o'clock a. m. [117]

[Title of District Court and Cause.]

**STIPULATION CONSENTING TO
AMENDMENT TO ANSWER AND
CROSS-COMPLAINT**

It Is Hereby Stipulated and agreed by and between the parties hereto, represented by their respective attorneys, that defendant and cross-complainant, Joint Highway District No. 13 of [118] the State of California, a public corporation, may amend its answer and cross-complaint in the following particulars:

1. That on page 22, line 11, paragraph IV, of its counter-claim said defendant and cross-complainant may insert the figures \$591,325.47 in place and in lieu of the figures \$579,180.46.

2. That on page 34, line 25, paragraph X, of its cross-complaint said defendant and cross-complainant may insert the figures \$591,325.47 in place and in lieu of the figures \$579,180.46.

That upon the filing of this stipulation the Clerk of the above-entitled Court may make said corrections upon the face of said answer and cross-complaint and that no amended pleading need be filed.

Dated: July 21, 1938.

THELEN & MARRIN
DeLANCEY C. SMITH
EUGENE E. TREFETHEN
J. PAUL ST. SURE

Attorneys for Plaintiff.

ARCHBALD B. TINNING
T. P. WITTSCHEN

Attorneys for Defendant and
Cross-Complainant.

REDMAN, ALEXANDER &
BACON

Attorneys for Cross-Defendants
other than Plaintiff.

**ORDER DIRECTING AMENDMENT TO
ANSWER AND CROSS-COMPLAINT.**

Upon the filing of the foregoing stipulation, It Is Hereby Ordered that the Clerk of this Court make the corrections [119] specified in the above and foregoing stipulation upon the face of the answer and cross-complaint of defendant Joint Highway District No. 13 of the State of California, and place his initials opposite said corrections in the margin of the page upon which the corrections are made in said answer and cross-complaint.

Dated: July 22, 1938.

MICHAEL J. ROCHE

District Judge.

[Endorsed]: Filed Jul. 21, 1938. [120]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 8th day of August, in the year of our Lord one thousand nine hundred and thirty-eight.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of District Court and Cause.]

This cause having been heretofore tried and submitted, being now fully considered and the Court having filed its written Opinion thereon, it is in ac-

cordance with said Opinion, Ordered that the defendant Joint Highway District No. 13, of the State of California is entitled to the interim expenditure of \$69,001.85, plus the reasonable cost of completing the project of \$98,066.31, plus liquidated damages for the period of 284 days of \$142,000.00, or a total of \$309,068.16; that each surety company cross-defendants which have continued to be a party to this action, are liable for the percentage which they assumed on the Six Companies' bond; that costs of this suit be paid by cross-defendants; and that judgment be entered herein accordingly upon findings of fact and conclusions of law to be prepared by the defendant and cross-complainant pursuant to Rule 42 of this Court. [131]

[Title of District Court and Cause.]

Thelen & Marrin, DeLancey C. Smith,
Eugene E. Trefethen, J. Paul St. Sure,
Attorneys for Plaintiff and Cross-Defendant.

Archibald B. Tinning, T. P. Wittschen,
Attorneys for Defendant and
Cross-Complainant.

Redman, Alexander & Bacon
Attorneys for Cross-Defendants other than
Plaintiff.

OPINION.

Roche, District Judge:

This is an action for damages for breach of contract. It is submitted to the court in the form of a

cross-complaint, brought by the Joint Highway District No. 13, a public corporation of the [121] state of California, hereafter called the District, against the Six Companies of California, a Nevada Corporation, licensed as a contractor in the State of California, and numerous foreign corporations, sureties on the Six Companies' bond. Hereafter the Six Companies will also be referred to as the Contractor.

On July 1, 1936, litigation was begun by the Six Companies, which sought to recover \$3,259,659.04, the balance claimed to be due for work done and materials furnished to the District. An answer and cross-complaint were filed by the District, which denied any indebtedness and set forth its own claims.

The District's cross-complaint alleges that on June 4, 1934, the District, in accordance with its authority, entered into a contract with the Six Companies whereby the latter agreed to undertake a project for the construction of a highway and highway tunnels and to furnish a faithful performance bond to the District. The surety companies, which have been joined as cross-defendants, were made jointly and severally liable with the Contractor upon the bond.

The District further alleges as follows: On June 13, 1936, the Six Companies abandoned their work, which was then about 70% completed. The Six Companies claimed the right to rescind the contract on several grounds, which were set forth in the

notice delivered to the District upon the cessation of work by the Contractor. The District promptly notified the Contractor and the surety Companies that they must proceed with their work; that if the job were not resumed, the District would have the project completed and would hold the Contractor and the sureties liable for the cost. Neither the Six Companies nor the sureties resumed construction and The District, after calling for bids, let contracts to other corporations for the completion of the work at a cost of \$1,751,611.74. [122]

The cross-complaint acknowledges that the District has retained \$224,560.79, or 10% of the contract price for work done prior to May 1, 1936; that the District has in its possession an additional \$265,891.82 for work performed by the Companies after May 1, 1936; that the District is holding \$2,806.55 on behalf of the Companies for past work performed; that these three amounts total \$493,259.16, from which sum must be deducted \$10,000.00 retained by the District as liquidated damages, thus leaving a credit of \$483,259.16. The District claims that the difference between the reasonable cost of completing the work and the contract price for the uncompleted work is \$591,325.47. This sum, less the above mentioned \$483,259.16 still retained for the Six Companies, leaves \$108,066.31 as the reasonable cost of completing the work necessitated by the Six Companies' default.

The District alleges that it became necessary for it (a) to protect and maintain the work at a rea-

sonable cost of \$47,944.33; (b) to measure the work at a reasonable cost of \$5,134.22; (c) to readvertise for bids at a reasonable cost of \$1,862.45; (d) to procure insurance at a reasonable cost of \$14,060.85. These sums total \$69,001.85. Furthermore, it is alleged that there was a delay of 433 days in the completion of the work directly attributable to the delay and abandonment on the part of the Six Companies. This was a reasonable period for the District to take to complete the project. It is extremely difficult to estimate all of the damages caused by the delay in the completion of the work. Liquidated damages of \$500.00 per day for this delay are asked by the District in accordance with #4 (d) of the contract, which reads as follows:

“(d) Damages for Delay.—The Parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual [123] completion of the work, said sum being specifically agreed upon as a measure of the damage, to the District by reason of delay in the completion of the work;

it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances, and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

The District asks for a judgment against the Companies in the sum of \$383,568.16, based on the allegations of the reasonable cost of completing the work, less credits, plus interim expenditures, plus damages caused by delay.

The Contractor and the sureties, in their answer to the cross-complaint, allege that the District had breached the contract by failing to furnish lines and grades as required by the contract, by not granting the contractor an extension of time to complete the work, by deducting liquidated damages from a progress payment made to the Contractor by the District; and finally it is alleged that the District presented plans and specifications to the Contractor which were deceiving and misleading in that the Six Companies were led to believe that the ground to be encountered in driving the tunnels would be found to be self-supporting and require little timber re-inforcement during construction, but that actually the entire tunnels needed timber, thus causing the Contractor to do more excavation

than planned and furnish more concrete than anticipated.

After a hearing, the Court ruled against the Six Companies on the common counts, and concluded that the plaintiffs were guilty of a breach of contract. Thus it follows that the District is entitled to relief on its cross-complaint and the only remaining question concerns itself with the amount of damages which must be awarded to the District.¹ The problem may be stated as follows: When a builder breaches a contract by reason of an abandonment, and such a contract contains a liquidated damage clause, to what extent is the builder liable in damages? [124]

There is no dispute as to the accuracy of the various damage figures presented by the District. But the Companies, assuming a breach of contract as found by the court, deny that they are liable for liquidated damages or for the interim expenditures. The Companies assert that the provision for liquidated damages can have no application to a delay occurring after the contract has been abandoned. They further maintain that even if the provision for liquidated damages is applicable, it must be held to be unenforceable because it is a penalty.

In support of the contention that a provision for liquidated damages is inapplicable to a situation in

1. The surety companies are jointly and severally liable under the Six Companies' bond. Certain technical defenses, which the sureties suggest might absolve them from liability, do not impress the Court.

which delay occurs because of abandonment, the Companies rely chiefly upon two California cases, namely *Bacigalupi v. Phoenix Bldg. Construction Co.* (1910) 14 Cal. App. 632 and *Sinnott v. Schumacher* (1919) 45 Cal. App. 46. These cases hold that a plaintiff may sue for actual damages when a defendant has breached his contract, notwithstanding a liquidated damage clause in the agreement. But this is not to say that a plaintiff, or cross-complainant, may not act upon the liquidated damage provision in a contract when he seeks damages for delay caused by an abandonment. That he may rely on such a clause is recognized in *Southern Pacific Co. v. Globe Indemnity Co.* (1927) 21 F2d 288, where a question much like the one in the principal case arose. There the court held that the aggrieved party may recover liquidated damages for delay, whether the contract is abandoned or not, the court saying:

"It is urged that a liquidated damage clause does not apply when work under the contract is abandoned by the contractor * * * A close examination of the cases, however, does not in our opinion establish such a rule, and we can see no justification for it, at least when the contractor abandons after the time for completion has passed. In such a case some part of the liquidated damages has accrued before the repudiation. No intelligible reason has been suggested why the owner should lose his right to them because of subsequent repudiation.

“* * * In these cases (*Bacigalupi v. Phoenix Co.* and like decisions), the plaintiff made no claim to collect liquidated damages for delay, as well as the increased cost of completing the abandoned work. They are not, therefore, authorities for the alleged rule that he cannot do so * * *” [125]

The Court then ruled that the plaintiff was entitled to liquidated damages for the time the original contractor would have taken to complete the job, had he remained at work.

The cases which are mentioned and distinguished in this opinion, and a statement made by Williston (Vol. 3 #785), and based upon these same cases, are relied upon by the Six Companies. The Reasoning in the *Southern Pacific* decision—which is in accord with *City of Reading v. U. S. Fidelity, etc. Co.* (1937) 19 F. Supp. 350, and *School District v. U. S. Fidelity and Guarantee Co* (1915) 152 P. 668—is sound and applies in the case before the Court.

Adopting the rule that a liquidated damage provision in a contract must be enforced, whether or not delay in completion is caused by abandonment, the question then arises as to the length of the period for which such damages may be recovered. Obviously, the per diem arrangement does not run during the entire period of delay. This much the District itself recognizes, for it asks for damages for 433 days, although over 500 days elapsed between the time the project was supposed to have

been completed and the date the work was actually finished. The 433 days are made up of three periods: 264 days (reasonable time), for the actual finishing of the tunnels and highway by new contractors; 20 days of work for the Six Companies themselves after the contract time limit had expired; 149 days between the date of abandonment and the date work was resumed. How many of these days should be allowed in fixing the period for which liquidated damages are recoverable?

In McCormick on "Damages" at page 619 this statement is found: The delay provision applies "to this extent, that the owner may recover for the delay through the period that would have been consumed by the contractor if he had, instead of the owner, carried the work to completion." Under this rule, the [126] first two periods may properly be tabulated in ascertaining the time necessary to carry out the project if the Six Companies had themselves completed the work. But the third item—the lapse of time during which no work was done—may not be considered. It may be argued that it is unfair to disregard the gap between construction periods, for it is impossible to avoid such delay. This is true, but the Court believes that the rule as stated by McCormick is both practical and in accordance with the intent of the parties to the contract, even though it may work a hardship in certain cases. By refusing to award damages for the total period of delay, the temptation to procrastinate in employing new contractors is diminished.

And even when the employer acts in good faith and with as much speed as possible, as in the case at bar, there are many factors which may operate to prolong the period of inactivity indefinitely, such as the District's inability to get bids from new contractors. To allow per diem damages to accrue during such a period of suspension in operations would be neither fair nor in accordance with the intent of the parties. Furthermore, the liquidated damage clause in the contract before the court refers to "every *working day*" which may elapse between the limiting date . . . and the date of actual completion"—and not simply to the total lapse of time between the start and the finish of the project. This contract language necessarily leads the court to follow the McCormick rule.² In the normal case, the delay provision applies to the original contractor; in our case, which is exceptional, it applies to the time the Six Companies *would have taken* had they completed the job themselves—and this time is measured by the period reasonably required by the new contractors to finish the project. The intent of

2. In *School District v. U. S. Fidelity and Guarantee Co.* (1915) 152 P. 668 liquidated damages were allowed for the reasonable period of delay, including the period of inactivity. We do not believe that such an award was incorrect in view of a contract provision allowing damages for each day beyond a certain time until the work was completed, but we think that the contract and the facts in the principal case do not warrant the inclusion of the gap between abandonment and recommencement of work.

*Italics in this Opinion are by the Court.

the parties is to determine the harm caused by the late completion of the work; liquidated damages must be limited to such a period. [127]

There is no merit in the contention of the Six Companies that the liquidated damages provision is void. Section 1670 of the California Civil Code, while declaring fixed damage clauses invalid in many contracts, is followed by an exception which applies directly to the facts found in the principal case. The exception is contained in Section 1671 of the Cal. C. C. which reads: "The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages." Clearly the contract between the District and the Six Companies comes within this exception. The injury suffered by the District through delay in performance cannot be measured accurately. It is known that the cost of maintaining the District is \$272.89 per day; but how can the harm caused by the lack of use of the highway and highway tunnels be determined? The interest on the bonds amounting to about \$200.00 per day is not a yardstick for measuring such damages. Even if the maintenance cost and the interest are looked upon as a rough approximation of the injury suffered by the District, they do not take the case out of the exception; they merely indicate that the \$500.00 liquidated damage provision in the contract comes close to measuring actual damages.

Furthermore, at the time the contract was drawn up, there was no accurate way of measuring the injury which might be suffered through delay in completing the project and thus preventing its use. *Hanlon Dry Dock Co. v. McNear* (1886) 70 Cal. 204, 210, and *P. Factor Co. v. Adler* (1891) 90 Cal. 110, both hold that if the damages are not measurable at the time the contract is entered into, then a liquidated damage provision is valid; nor is it nullified by the fact that it may be called a penalty. The Supreme Court has also sustained such liquidated damage provisions, even in the absence of proof of any actual damages (*U. S. v. Bethlehem Steel Co.* (1906) 205 U. S. [128] 105, *Wise v. U. S.* (1918) 249 U. S. 361, *Robinson v. U. S.* (1922) 261 U. S. 486 and other cases). The provision in the principal case is valid.³

3. It is necessary that an adjustment be made in the allocation of damages in the principal case. The District has deducted \$10,000.00 from the amount which is being held for the cross-defendants. This sum of \$10,000.00 represents liquidated damages for the 20 days' delay by the Six Companies before their abandonment. Thus the District has figured an element of liquidated damages in its determination of the reasonable cost of completing the project. This we believe to be error, even though the District is entitled to the \$10,000.00 quite apart from the Court's ruling on the general question of liquidated damages. The entire sum due the District as liquidated damages should be computed as a unit—264 days by new contractors plus 20 days by the Six Companies. There must be no confusion between liquidated damages and reasonable costs.

The assertion of the Six Companies that they are not liable for the interim expenditures does not warrant serious consideration. The costs of maintaining the work after abandonment, of calling for new bids and of making other necessary expenditures for keeping the project in order until work could be resumed, obviously spring directly from the breach of contract and are recoverable as damages. The reasonableness of the amounts has neither been refuted nor seriously challenged; the evidence sustains them.

Accordingly, the Court holds that the District is entitled to the interim expenditures of \$69,001.85, plus the reasonable cost of completing the project of \$98,066.31, plus liquidated damages for the period of 284 days of \$142,000.00, or a total of \$309,068.16; that each surety company cross-defendants which have continued to be a party to this action, are liable for the percentage which they assumed on the Six Companies' bond; that costs of this suit be paid by cross-defendants; that findings of fact and conclusions of law be prepared by the District pursuant to Rule 42 of this Court. [129]

Dated: August 8th, 1938.

MICHAEL J. ROCHE

United States District Judge.

[Endorsed]: Filed Aug. 8, 1938. [130]

[Title of District Court and Cause.]

**REQUEST FOR SPECIAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW.**

Defendant and Cross-Complainant, Joint Highway District No. 13 of the State of California, a public corporation, requests the Court to find the following facts and to enter the following conclusions of law all in accordance with findings of fact and conclusions of law hereto attached.

Dated: August 12th, 1938.

**ARCHIBALD B. TINNING
T. P. WITTSCHEN**

Attorneys for Defendant and
Cross-Complainant. [132]

[Title of District Court and Cause.]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW. [133]**

The above-entitled cause came on regularly for trial before the above-entitled court, Honorable Michael J. Roche Judge presiding, without a jury, a jury having been expressly waived by written stipulation of all the parties hereto heretofore filed in the above-entitled court and cause. Said trial began on the 12th day of April, 1938; plaintiff and cross-defendant Six Companies of California appearing by its counsel Messrs. Thelen & Marrin, DeLancey C. Smith, Eugene E. Trefethen and J.

Paul St. Sure; defendant and cross-complainant, Joint Highway District No. 13 of the State of California, appearing by its counsel Archibald B. Tinning, Esq. and T. P. Wittschen, Esq.; and the cross-defendant Surety Companies above named appearing by their counsel Messrs. Redman, Alexander & Bacon.

Upon motion of the defendant and cross-complainant, duly and regularly granted by the court, the cause of action stated in the cross-complaint of defendant and cross-complainant Joint Highway District No. 13 of the State of California was dismissed as to cross-defendants Fireman's Fund Indemnity Company, a California corporation, and Pacific Indemnity Company, a California corporation.

The court proceeded with the trial of said cause from day to day until concluded, and testimony and exhibits were introduced on behalf of the parties to said action, and at the conclusion of taking said testimony and offering of documents the case was duly argued and submitted; and now the court having fully considered the facts and being duly advised in the premises makes and renders its decision herein comprising Findings of Fact and Conclusions of Law as Follows:

FINDINGS OF FACT.

I.

Finds that plaintiff, Six Companies of California, was [134] at all the dates and times herein mentioned and still is a corporation duly incorpo-

rated, organized and doing business as such corporation under and by virtue of the authority of the laws of the State of Nevada, and is now and at all the times herein mentioned was and has been a citizen of the State of Nevada.

II.

Finds that defendant, Joint Highway District No. 13 of the State of California, is now and at all the dates and times herein mentioned was and has been a public corporation duly organized and existing under and by virtue of the authority of the laws of the State of California, and is now and at all the dates and times herein mentioned was and has been a citizen of the State of California.

III.

Finds that the proceeding herein is one of a civil nature and the parties were at all the dates and times herein mentioned and still are citizens of different states; that the sum involved herein, exclusive of costs and interest, is in excess of the sum of \$3,000, the claim of said plaintiff in the prayer of its complaint being for the sum of \$3,259,695.04.

IV.

Finds that the grounds upon which the jurisdiction of this court depends are as follows:

(a) The existence of diversity of citizenship between the parties plaintiff and defendant, and that the suit is one of a civil nature between citizens of different states; and

(b) The amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

V.

Finds it is not a fact that within two years last past or ever or at all said defendant became indebted to plaintiff in [135] the sum of \$5,280,742.15 or in any other sum at all for work done or labor performed or materials furnished by said plaintiff to defendant at the special instance or request of said defendant or otherwise, and the court expressly finds said defendant is not indebted to plaintiff in the said amount or in any sum at all and that there is no sum due or owing or unpaid from defendant to plaintiff on account of the reasonable value of any work done or labor performed or materials furnished by plaintiff for defendant or otherwise.

VI.

Finds that at all times during the performance by plaintiff of any work for defendant as herein alleged plaintiff was a duly licensed contractor under the laws of the State of California.

VII.

Finds that on the 4th day of June, 1934, a contract in writing was duly and regularly entered into between defendant and plaintiff, wherein and whereby plaintiff as contractor agreed with defendant as owner that the said plaintiff pursuant to the terms of said contract and for and on behalf of defendant would construct, erect and complete a cer-

tain project of said defendant, which project included a highway, highway tunnel and approaches with appurtenant structures, including ventilation buildings, ventilation equipment and accessories, and the construction of highway approaches with pavement, drainage structures, curbs, gutters and sidewalks where required, construction of grade separation structures, viaducts, retaining walls and incidental structures, and connections with existing streets, all as described in [136] said contract between the said parties, which project is located within the boundaries of said defendant District and partly within the City of Oakland, County of Alameda, State of California, and partly within the County of Contra Costa, State of California, all in accordance with the final surveys, plans, specifications and detailed drawings therefor, together with the amendments and supplements to said specifications dated January 9, 1934 and April 3, 1934, theretofore adopted by the Board of Directors of said Joint Highway District No. 13, and which contract, plans and specifications and amendments at all times herein mentioned had been on file in the office of said defendant District, and which said contract, plans and specifications and amendments have been duly admitted in evidence in this action.

VIII.

Finds that upon the letting of said contract plaintiff did commence the construction of said project and did continue the said work, receiving

each month from defendant the monthly progress payments provided for in said contract for work done during the preceding month, which payments so made by defendant to plaintiff and accepted and retained by plaintiff up to the 13th day of June, 1936, amounted to \$2,021,047.11.

IX.

Finds that on the 13th day of June, 1936, and after plaintiff had been so engaged on said work for approximately a period of two years plaintiff quit and abandoned said work and refused to proceed further with the performance of said contract, and did deliver to defendant a notice of abandonment and attempted [137] rescission in the words and figures as follows:

“June 13, 1936

Joint Highway District No. 13
of The State of California,
1448 Webster Street,
Oakland, California.

Gentlemen:

You are hereby notified that the undersigned, Six Companies of California, has elected to and does hereby terminate and rescind the contract dated June 4, 1934, between the undersigned and your District for the construction, erection and completion of the project of said Joint Highway District No. 13 of the State of California, which includes a highway, highway tunnels, and approaches with the

appurtenant structures located partly in the City of Oakland, County of Alameda, State of California, and partly in the County of Contra Costa, State of California, commonly known as the Broadway Tunnel Project.

Said rescission is made upon the following grounds and each and all of them:

First: Through your fault the consideration for our obligations under said contract has failed in part in that you have failed and refused to pay us the amount estimated by you to be due us under the monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount estimated by you to be due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract, said deduction being computed at the rate of \$500 per day for each day in May 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30, and a nonworking day, Sunday, May 31st. Said deduction was and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any dam-

ages for delay in completion of the contract can only be asserted or claimed against the contractor for working days after the contract date for completion.

Second: That the consideration for said contract has failed in a material respect in that you have breached said contract by refusing to pay us the amount due us under your monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract within contract time, said deduction being computed at the rate of \$500 per day for each day in May, 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30th, and a non-working day, Sunday, May 31st. Said deduction was [138] and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any damages for delay in completion of the contract can only be asserted or claimed against the contractor for working days after the contract date for completion.

Third: That in failing to pay said sum mentioned in numbered paragraphs First and Second above and by your refusal to grant said extension of time you have breached said contract, and ground for rescission has arisen in our favor.

Fourth: That your failure and refusal to grant us the extensions of time to which we are entitled as a matter of right and of law for completion of said contract after May 24, 1936, although we have repeatedly requested the grant of such extensions is a breach of the contract.

Fifth: Because the ground encountered in the excavation for the tunnels provided for in the contract has been and is entirely and radically different from the character of ground represented to the contractor as that which would be encountered, and which was contemplated and predicted by the contract, geological report, specifications, plans and any and all other documents forming a portion or part thereof.

Sixth: For your failure and refusal to furnish points, lines and grades for us to work to and other engineering work in the construction of the tunnels as is required to be done or furnished by you by the terms and provisions of the contract and specifications forming a part thereof.

lay and continue to delay the work you contracted to perform, and your attempted rescission and termination of the contract, and each and all of them, constitute wilfull breaches of the contract by you.

You are further advised that unless you as said contractor resume work on the project and perform the same in accordance with all of the terms thereof within three (3) days of the date of your receipt of this letter, that this District will consider your acts and conduct as aforesaid a final abandonment of the contract and the work to be [140] done thereunder, and the District will proceed to complete the same in accordance with the provisions of the contract, and that the District will hold you and your bondsmen liable for any and all costs thereof in excess of the contract price and any and all damages to this District by reason of your wilfull abandonment of the work in violation of the terms of your contract with this District dated June 4, 1934.

Yours very truly,

JOINT HIGHWAY DISTRICT
NO. 13 OF THE STATE OF
CALIFORNIA,

By L. V. EATON,

Assistant Secretary."

That the notice and letter in this paragraph referred to was received by the plaintiff on the day it bears date.

XI.

Finds that on the 13th day of June, 1936, plaintiff ceased all work under said contract and on said project, and on said date refused and ever since said date has refused and still continues to refuse to proceed further therewith, and that on said date said defendant wrongfully abandoned the said work and contract between plaintiff and defendant.

XII.

Finds:

(1) That at all times said contract between plaintiff and defendant provided that the work to be done under said contract by plaintiff for defendant should be completed within 720 calendar days from and after the execution of said contract, and it was stated in said contract that time was of the essence of said agreement and said contract between plaintiff and defendant so provided; that the said 720 days for completion of said contract expired on May 24, 1936.

(2) That it is provided in paragraph 3 of said contract that the whole of said work is to be done by plaintiff to the satisfaction and approval of defendant and in strict accordance with the plans and specifications entered into between the parties. [141]

(3) That it is further provided in paragraph 4 of said agreement that the plaintiff is skilled in the trade or calling necessary to perform the work agreed to be done under the agreement and that the defendant not being skilled in such matters

relied upon the skill of plaintiff to do and perform the work and labor necessary in the most skillful and durable manner.

(4) That the specifications for said work are expressly made a part of said contract.

(5) Section 2, subparagraph (b) of said specifications read as follows:

“Estimates of Quantities.—Where estimates of quantities are given on the Proposal Form, or in ‘Notice to Contractors,’ or in any Contract executed hereunder, it is hereby declared and shall be understood that such quantities are approximate only, being given as a basis for comparison of bids. The District does not expressly or by implication agree or guarantee that the actual amount of work will correspond therewith, but reserves the right to increase or decrease the amount of any class or portion of the work, or to omit portions of the work as may be deemed necessary or expedient by the District Engineer.”

(6) Section 2, subparagraph (c) of said specifications, reads as follows:

“Examination of Plans, Specifications and Site of Work.—The bidder is required to examine carefully the site of the work, the Proposal Form, and plans, specifications and contract forms for the work contemplated. The submission of a Proposal shall be considered prima facie evidence that the bidder has made

such an examination and is satisfied as to the conditions to be encountered, as to the character, quality and quantities of work to be performed and materials to be furnished, and as to the requirements of the specifications, plans and contract, or contracts."

(7) Section 4, subparagraph (a) of said specifications reads as follows:

"Commencement of Work.—The Contractor shall commence work within ten (10) days after the execution of the contract for the work by the Board of Directors and shall continue without interruption unless otherwise directed by the District. At least three (3) days before starting, the Contractor shall notify the District Engineer in writing of the date that work is to commence." [142]

(8) Section 4, subparagraph (b) of said specifications reads as follows:

"Completion of Work.—The time of completion of the entire work specified herein shall be within a period of seven hundred and twenty (720) calendar days from the date of the execution of the contract by the Board of Directors."

(9) Section 4, subparagraph (c) of said specifications reads as follows:

"Extension of Time.—The time during which the Contractor is delayed in said work by Acts

of God, or by stormy or inclement weather or by any reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof."

(10) Section 4, subparagraph (d) of said specifications reads as follows:

"Damages for Delay.—The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages

sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor.

(11) Section 5, subparagraph (a) of said specifications as amended on April 3, 1934, reads in so far as material as follows:

“Partial Payments: Payments will be made only upon the certificate of the District Engineer for work actually performed. The District Engineer shall measure the work on or about the first day of each month and at the time of completion of the entire work, and shall render a certificate on or about the tenth day of each month and at the completion of the entire work, stating the amount of work performed during the previous calendar month, and during the current month, at the time of completion. The Contractor shall then, at the times above specified, be entitled to receive a payment from the District in an amount to be determined as follows: [143]

Until the total value of the work done since commencement of performance of the contract exceeds Four Hundred Thousand Dollars (\$400,000.00) the payment will be seventy-five per cent (75%) of the amount specified in the District Engineer's certificate; thereafter and

until the total value of the work done since the commencement of performance of the contract equals One Million Dollars (\$1,000,000.00), the constant sum of One Hundred Thousand Dollars (\$100,000.00) will be retained by the District out of said total value; thereafter the progress payment will be ninety per cent (90%) of the amount specified in the Engineer's certificate, provided that no such estimate of payment shall be required to be made when, in the judgment of the District Engineer, the work is not proceeding in accordance with the provisions of the contract, or when, in his judgment, the total value of the work done since the last estimate amounts to less than Five Hundred Dollars (\$500.00), except the certificate and payment required at the completion of the entire work.

The acceptance by the Contractor of the final ninety per cent (90%) payment for the completed work shall be and shall operate as a release to the District from all claims and liability to the Contractor for anything done or furnished for or relating to the work or for any act or neglect of the District or its agent in any way affecting the work, excepting the claim of the Contractor against the District for the moneys herein provided to be paid by the District to the Contractor thirty-five (35) days after the acceptance of the contract."

Subparagraph (b) reads as follows:

“Final Payments: Thirty-five (35) days after the acceptance of the work by a certificate of acceptance duly rendered by the District Engineer and final approval and acceptance by the Board of Directors of the District, the Contractor shall be entitled to receive a payment of the balance due under this contract in the amount of ten per cent (10%) of the aggregate amount of all certificates of the District Engineer.”

Section 7 of the contract dated June 4, 1934, providing for payments by defendant to plaintiff, is identical with the foregoing provisions of Section 5 of the specifications.

(12) Section 6, subparagraph (b) of said specifications reads as follows:

“Authority of District Engineer.—The District Engineer shall decide any and all questions which may arise as to the quality or acceptability of materials furnished and work performed and as to the manner of [144] performance and rate of progress of the work, and shall decide all questions which may arise as to the interpretation of the plans and specifications, and all questions as to the acceptable fulfillment of the contract on the part of the Contractor and as to compensation. His decisions shall be final and he shall have executive authority to enforce and make effective such decisions and orders as the Contractor fails promptly to carry out.”

(13) Section 6, subparagraph (c) of said specifications reads as follows:

“Compliance with Specifications.—It shall be the duty of the Contractor to see that the provisions of these specifications are complied with in detail, irrespective of the inspection of the work during its progress by the District Engineer or his representatives.”

(14) Section 6, subparagraph (d) of said specifications reads in so far as material as follows:

“Inspection. — The Contractor shall afford every facility necessary for the safe and convenient inspection of the work throughout its construction and for inspection of materials used or to be used. The District Engineer shall have power to reject material and workmanship which are not in accordance with specifications, and all such must be removed promptly by the Contractor and replaced to the satisfaction of the District Engineer without extra expense to the District.

The failure of the District Engineer or his representatives to discover and condemn work not in accord- [145] ance with the specifications shall not relieve the Contractor of his obligation to the District to furnish proper materials and work as provided in these specifications; nor shall it relieve the Contractor from being compelled to remove and replace promptly any work found to be defective at any time during

the construction of the work, or before the final acceptance of the work."

(15) Section 6, subparagraph (e) of said specifications reads as follows:

"Disputes.—To prevent disputes and litigation the District Engineer shall in all cases determine the amount, quality and acceptability of the work and materials which are to be paid for under these specifications. He shall determine all questions in relation to said work and materials and performance thereof and all questions which may arise relative to the fulfillment or interpretation of these specifications on the part of the Contractor. His estimate and decision shall be final and conclusive, and in case any question shall arise between the Contractor and the District pertaining to the contract, the District Engineer's estimate and decision shall be a condition precedent to the right of the Contractor to receive any moneys under the contract."

(16) Section 6, subparagraph (g) of said specifications reads as follows:

"Alterations.—In case of reduction or increase in quantities of work, by reason of alterations or any cause whatsoever, the Contractor shall accept payment in full at the contract unit prices for the actual quantities of work done and no allowance will be made for anticipated profits due in such reduction or increase."

(17) Section 6, subparagraph (h) of said specifications reads as follows:

“Interpretation of Plans and Specifications.
—Should it appear that the work to be done or any matters relative thereto are not sufficiently detailed or explained in the plans and specifications, the Contractor shall apply to the District Engineer in writing for such further details and explanations as may be necessary, and he shall conform to the same as part of the contract insofar as they may be consistent with the original specifications and plans. In the event of any doubt or question regarding the true meaning of the specifications, the decision of the District Engineer shall be final. In the event of any discrepancy between any drawing and figures written thereon, figures shall be taken as correct.

Should the Contractor believe that any work ordered is not properly a part of his contract or according to [146] the intent of these plans and specifications, he shall before commencing same notify the District Engineer in writing of his objection to same and shall not perform such work until notified in writing by the District Engineer as to his decision in the matter. The commencement of any such work shall act as a waiver by the Contractor of any objection he may have to the execution of such work, and as a waiver of any claim for extra work in consequence of such order.

These specifications and plans shall be considered as supplementary one to the other, so that materials and workmanship, indicated, called for, or necessarily implied by the one and not by the other, shall be supplied and placed in the work the same as though specifically called for by both."

(18) Section 6, subparagraph (i) of said specifications reads as follows:

"Compliance with Legislation.—The Contractor shall conform to all federal, State, County and Municipal laws, ordinances and regulations, which may apply to the work herein provided for and during the progress thereof, and shall pay for licenses, fees and other charges levied or charged in accordance with such laws, ordinances or regulations, and no claim for extra payment shall be made to the District for such fee, license or charge, it being specifically understood that such licenses, fees or charges are covered by the unit prices bid."

(19) Section 6, subparagraph (k) of said specifications reads as follows:

"Contractor's Liability.—On all work the Contractor is to assume all liability of every kind or nature, arising from said work, either from accident, negligence or any cause whatsoever during the progress of the work and before the final acceptance thereof, and shall

indemnify and hold the District harmless therefrom, and the bonds given by the Contractor shall hold and secure the said District free and harmless from any or all damage or expense whatsoever."

(20) Section 6, subparagraph (m) of said specifications reads as follows:

"Sub-letting and Assignment.—No subcontractor will be recognized as such and all persons engaged in the work of construction will be considered as employees of the Contractor and their work shall be subject to the provisions of the contract and specifications. Where a portion of the work which has been sublet by the Contractor is not prosecuted in a manner satisfactory to the District Engineer, the subcontractor shall be removed immediately on the order of the District Engineer and shall not be employed again upon the work. [147]

"Neither the contract nor any part thereof shall be assigned unless the Board of Directors first consents in writing to such assignment. Such assignment shall not relieve the Contractor or his bondsmen from any liability whatsoever."

(21) Section 6, subparagraph (n) of said specifications reads as follows:

"Contractor Guarantees Work.—It is understood that the Contractor is skilled in the trade or calling necessary to perform the work herein set forth and that the District, not being skilled

in such matters, relies upon the Contractor to do and perform all work necessary, and to do, supply and furnish all the acts and things necessary, at the proper times and in the most skilful and desirable manner, and the Contractor guarantees the workmanship and materials furnished and supplied to be the best of their kind. The acceptance of any part or of the whole of the work does not operate to release the Contractor or his bondsmen from said guarantee."

(22) Section 6, subparagraph (q) of said specifications reads as follows:

"District May Perform Work.—(1) The Contractor agrees that if the work to be done under this contract shall be abandoned, or, if in the opinion of the Board of Directors the work or any part thereof is unnecessarily or unreasonably delayed, or if the same is not prosecuted with the diligence and force specified, meant and intended in and by the terms of the contract; or if the Contractor is wilfully violating any of the conditions or covenants of the contract and specifications or of the plans or of any part of the contract, or is executing the work in bad faith, the said Board of Directors shall then have the power to notify said Contractor to discontinue the work or any part thereof under the contract, and thereupon the Contractor shall cease to continue such work or such part thereof as the Board of Directors may designate.

(2) The said District shall thereupon have the power to place such or so many persons and to obtain by contract, purchase or hire such animals, equipment, tools, materials and labor as the District Engineer may deem necessary to work at and to be used to complete the work herein described, or such part thereof as the District Engineer may deem necessary; and to use such materials as may be found upon the site of the work, and to procure other material for the completion of the work, and to charge the expense of such labor, material, animals, equipment, etc., to the Contractor, and the expense so charged shall be deducted and paid by the District out of such money as may be due or may at any time thereafter become due to the Contractor under and by virtue of this contract or any portion thereof. [148]

“(3) In case such expense is less than the sum which would have been payable under this contract at the unit prices bid, as calculated from the District Engineer’s final estimate if the work had been completed by the Contractor, then the Contractor shall be entitled to receive the difference, but in case such expense shall exceed the last said amount then the Contractor and his bondsmen shall be jointly and severally liable to pay the amount of such excess to the District on notice by the District of the amount of excess so due.”

(23) Section 6, subparagraph (r) of said specifications reads as follows:

“Temporary Suspension of Work.—The District Engineer shall have the authority to suspend the work wholly or in part for such period as he may deem necessary, due to unsuitable weather, or to such other conditions as are considered unfavorable for the suitable prosecution of the work, or for such time as he may deem necessary due to the failure on the part of the Contractor to carry out orders given, or to perform any provision of the contract. The Contractor shall immediately respect the written order of the District Engineer to suspend the work wholly or in part. The work shall be resumed when conditions are favorable and methods are corrected, as ordered or approved in writing by the District Engineer.”

(24) Section 6, subparagraph (s) of said specifications reads as follows:

“Lines and Grades.—The Contractor is to furnish free of charge all stakes necessary for marking and maintaining points and lines given by the District Engineer; and shall give the District Engineer such facilities and materials for giving said lines and points as he may require, and the District Engineer’s marks must be carefully preserved.

Sufficient points to line and grade will be set for the Contractor to work to and no additional stakes will be set. Any such stakes or marks

lost, damaged or obliterated shall be replaced at the expense of the Contractor.

The Contractor shall do his own engineering and shall be responsible for the completion of the work to proper lines and grades in conformance with the stakes set by the District Engineer.

The District Engineer shall be furnished facilities for the checking of lines, elevations, grades and forms at all times during the progress of the work. The Contractor shall, without charge to the District, provide openings for and suspend work that will in any way interfere with the surveys, at such times and for such periods as the District Engineer may deem necessary." [149]

(25) The part of said specifications dealing with tunnel construction contains the following provisions:

Section 32, subparagraph 3:

"Safety Rules.—The Contractor shall provide himself with copies of 'Tunnel Safety Rules' and 'General Construction Safety Orders Relating to the Storage and Use of Explosives,' together with all revisions and amendments thereto, as required by the Industrial Accident Commission of the State of California and keep copies of these at the site of the work at all times. He shall consult with officials of the Industrial Accident Commission and inform himself of any and all conditions which they

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may require, whether set forth in the published rules or specially provided for on this work. He shall thoroughly familiarize himself with the provisions of said rules and all regulations of said Commission and govern all his operations by the requirements in all particulars where the same are applicable. He shall see to it that all superintendents, foremen and other employees having responsibility for the various phases of the tunnel work are likewise familiar with the provisions referred to above, and that all work is conducted in accordance therewith. The requirements concerning ventilation, general safety precautions, transportation, roof inspection, timbering, electrical installations and use of explosives are of particular importance.

Representatives of the U. S. Bureau of Mines and of the Industrial Accident Commission of the State of California shall be afforded free access to the work at all times and be given every facility for inspecting methods, equipment and familiarity of workmen with the various safety rules and requirements.

All Federal and State regulations for such work or parts thereof and regulations of Counties and Municipalities having local jurisdiction shall be strictly adhered to, and authorized officials representing the Federal or State governments or Counties or Municipalities having jurisdiction shall be given every facility for inspection and proper enforcement of rules, pro-

visions, regulations and ordinances which may apply to the conduct of the work. The Contractor shall be responsible during the entire progress of the work for the proper enforcement of all such requirements and shall assume all liabilities which may occur due to accidents of any kind or nature. The fact that no apparent violation of rules or regulations has occurred shall not serve to relieve the Contractor of his full liability or responsibility in case of accident or damage to persons, employees, or to any part of the work.

Provisions shall be made by the Contractor for a supply of fresh air sufficient for the safety, comfort and efficiency of all persons engaged in the tunnel construction, at all times in all portions of the work. [150] Provisions shall be made for the quick removal of gases resulting from blasting and frequent tests shall be made for harmful or explosive gases emanating from the rock structure.

Should compliance with safety rules and regulations require special equipment the Contractor shall at all times keep on hand on the work enough of such special equipment to supply, in addition to his own requirements, complete equipment for at least three men, for the use of the District Engineer and his assistants in inspections of the work or in giving lines and grades, or as the District Engineer may direct."

Section 32, subparagraph 4:

“Geological Data.—A preliminary report on geological structures through which the tunnel will pass is on file in the office of the District Engineer. This report is available for inspection by prospective bidders at the office of the District Engineer. The Board of Directors of the District and the District Engineer do not guarantee in any respect the accuracy of this report or the findings of recommendations contained therein. The fact that prospective bidders are permitted to inspect this report shall not in any respect relieve prospective bidders of their responsibility to make their own investigations as to the materials which may be encountered or the geological structures, independent and separate from those made by the District, and the Contractor shall have no claim whatsoever for damages, unexpected costs, difficulties, or for the alteration or voiding of the contract, should materials encountered vary in any respect from those indicated in the preliminary report referred to.”

Section 32, subparagraph 5(a):

“Excavation of Tunnels: (a) Excavation.—The Contractor shall use approved modern methods in driving and excavating the tunnels, such as will assure a good rate of progress. He shall furnish and install all timbering, lagging and other supports necessary to provide ample security against falling earth or rock, caving or

other movements of the roof, sides or bottom of the excavation. He shall provide for the proper drainage and disposal of water encountered in the excavation.

Before performing any excavation in the tunnel the Contractor shall submit to the District Engineer his proposed method of procedure, giving in detail the various operations leading up to and including the final completed line section, and no such work shall be performed until the approval by the District Engineer of the procedure has been obtained. Such approval by the District Engineer shall not, however, in any way relieve the Contractor of his responsibility for the failure of the method, or for lack of proper progress in his operations. [151]

Section 32, subparagraph 5(b):

“Overbreak.—Excavation shall be of sufficient size to allow for the proper bracing timbering, construction of lining and forms, and drainage. Extreme care shall be taken in making excavation for the tunnel that the minimum of earth or rock shall be removed or allowed to cave or settle outside of the outer periphery of the concrete structure which forms the tunnel lining. However, should the Contractor damage or shatter, in any way, materials lying outside of the neat lines of the concrete structure, or should it become necessary in order to properly support the excavated sections that excess volumes be excavated to permit proper timbering

or other supports, the Contractor shall remove the rock or materials so damaged or excavated, and the space between the neat lines of the concrete structure, and the lines of actual excavation shall be filled with Portland Cement Concrete mixed in the same proportion and placed at the same time as the concrete in the neat structure, or, when permitted by the District Engineer, dry packed and grouted as herein-after provided. When timber is employed for tunnel timbering it shall be removed before any concrete is placed, and any spaces outside the neat lines of the concrete structure caused by such removal shall be filled with concrete as above provided. In the event that it is found impracticable, in the opinion of the District Engineer, to remove timbering or portions thereof, such timbering may be allowed to remain permanently in place, but in no case shall such timber so remaining be allowed to project into the neat lines of the concrete structure. Where timber is permitted to remain, all spaces outside of the neat lines of the concrete structure shall be filled with concrete mixed in the same proportions and placed at the same time as the concrete in the neat structure. If structural steel shapes are used for tunnel sets they may be allowed to remain permanently in place provided that they do not project into the concrete more than four inches (4") beyond said neat lines of the concrete structure.

Any excavation which, due to requirements of timbering or the nature of the material, or caused by over-breakage, extends more than one foot (1') from the outside neat lines of the concrete structure, may, at the option of the Contractor, in lieu of replacing with the Structural Concrete specified, be filled to within one foot (1') of said neat lines of concrete with spalls, boulders, or other material approved by the District Engineer and grouted in with a cement grout consisting of one (1) part of cement to three (3) parts of fine aggregate, and applied as directed by the District Engineer and to his satisfaction. Such construction, however, shall not be permitted within the one foot (1') space outside of the neat lines of the concrete structure, and such space shall be filled only with Portland Cement Concrete mixed in the same proportion and placed at the same time as the structural concrete, provided that if steel liner plates and ribs are used and are allowed by the District Engineer to remain in place, the [152] spaces back of plates and ribs shall be dry packed and grouted as provided, but any space between the plates and the neat lines of the structure shall be filled with concrete at the same time as the neat structure.

Wherever reference is made to 'neat lines of the concrete structure' it is hereby specified that the neat lines so referred to are the outside lines of the structural concrete lining, as shown on the plans."

Section 32, subparagraph 5(e):

"Timbering.—The term 'Timbering' as used herein shall include all wooden pieces or structures used to support the earth or rock adjacent to any excavation. The Contractor shall furnish, put in place, construct and maintain all timbering necessary to support the sides and top of the excavations, preliminary to the placing of the concrete lining. The timbering shall be so constructed as to prevent any movement or caving which might in any way injure the proposed structures or endanger any person. Wherever, in the opinion of the District Engineer, sufficient or proper timbering has not been provided, the Contractor shall furnish additional timbering. but neither compliance with the District Engineer's instructions nor failure of the District Engineer to give such instructions shall relieve or release the Contractor from his responsibility for the sufficiency of the timbering.

It is the general intent of these specifications that all timbering shall be removed from the excavation before concrete is placed. Should conditions arise where, in the opinion of the District Engineer, it is impracticable to remove certain timbers or structures, such timbering, upon the written consent of the District Engineer, may be permitted to remain, subject, however, to the provisions herein contained in respect to clearances outside of the concrete lin-

ing. Timbers allowed to remain in place shall in no case project into the neat lines of the concrete structure, and, in the event that it is apparent, during the process of excavation and timbering, that the safety of the excavation will require timbering to remain in place, the Contractor shall enlarge the excavated section to the extent necessary to set the timbers outside of future concrete lines; timbers found to project within the concrete lines shall be removed and reset before concreting. Permission to allow timbers to remain will not be granted for any other reason than to secure the safety of the structure.

Where timber is allowed to remain it shall be keyed or wedged firmly against the adjacent rock or earth, and shall be securely fastened, spiked or bolted so that no movement, shifting or settlement shall occur. All joints shall have full and firm bearing, timber to timber, without shimming or blocking. All timber, whether permanent or temporary, shall be sound Douglas fir and no second-hand material shall be used, provided, however, that material already used in tunnel construction and removed in good condition, may, with the approval of the District [153] Engineer, be reused where conditions permit.

Timbering shall be placed in such a manner as to be readily removed, without endangering the safety of the excavation or causing weak-

ness or excessive stresses in adjacent timber sets or concrete structures, and any damage which may occur shall be remedied by the Contractor at his own expense, including the removal and replacement of any concrete which has, in the judgment of the District Engineer, been damaged or subjected to excessive loads on account of such operations.

Lagging behind timber sets shall be restricted to the least extent consistent with safety, and, if, in any case, permitted by the District Engineer to remain permanently in place, shall be so spaced as to permit the unrestricted flow of concrete through the lagging to fill any spaces between the lagging and the excavated surfaces."

Section 32, subparagraph 5(f):

"Structural Steel Supports.—Structural steel shapes may be used to support the sides and tops of the excavation, either entirely or in connection with timbering. Where structural steel ribs are used the same may be allowed to remain in place, provided that they do not project into the concrete more than four inches (4") beyond the neat lines of the concrete structure. The manner of framing, supporting and removal shall be such as to fully support the excavation while in place, and permit removal without endangering other parts of the structure. All timbering used in connection therewith

shall conform to the requirements set forth under 'Timbering' including the removal before concrete is placed. Where steel is permitted to remain in place, all spaces between the steel and the adjacent earth or rock shall be thoroughly filled with concrete so as to provide firm and uniform bearing and the steel ribs and liners shall be so constructed and erected that no settlement or movement will occur. Liner plates allowed to remain in place shall not project into the neat concrete structure."

Section 32, subparagraph 5(g):

"Types of Tunnel Section.—Two typical tunnel sections are shown on the plans. The District Engineer shall determine which section shall be used in any specific location in order to meet varying conditions which may be encountered. In general, it is expected that the Type 'A' section will be used throughout the major length of the tunnels, but if conditions arise which, in the judgment of the District Engineer, require the use of Type 'B' section, the Contractor shall make such modifications in construction as may be necessary.

No extra payment will be allowed on account of such change, but the unit prices bid for the various units or [154] types of work shall include full compensation for such work, labor, material or equipment as may be necessary."

(26) The amendment and supplement to final specifications for the construction of said project,

adopted January 9, 1934, reads in so far as material herein in part as follows:

"The attention of all bidders is hereby specifically called to Bulletin No. 2 of Federal Emergency Administration of Public Works entitled 'General Information and Instructions for the Guidance of State Advisory Boards and State Engineers (P. W. A.).' A grant of thirty (30) per cent of the cost of labor and material used in the project of the District has been made by the Public Works Administration of the United States under the terms of said National Industrial Recovery Act, and all bidders are hereby advised that the Directors of the District will cooperate with the Public Works Administration and all its officers and employees in the enforcement of all of the provisions of said National Industrial Recovery Act and the rules and regulations heretofore and hereafter promulgated applicable to the performance of the work on the project of the District.

Bidders are advised to secure complete information as to the rules and regulations of the Public Works Administration applicable to the work to be performed to complete the project of the District, to the latest date available at the time the respective proposals of the bidders are submitted to the District."

XIII

Finds that subsequent to the first day of June, 1936, the District Engineer of defendant estimated

and certified the amount of work done by plaintiff under the terms of said contract for the month of May, 1936, and the sum due the plaintiff on or before June 10, 1936 under the terms of said contract, which sum was \$152,086.98 (less \$3,500 stipulated damages for delay as hereinafter found), and defendant on June 10, 1936 did transmit to plaintiff the sum of \$148,586.98, the amount of said estimate less the sum of \$3,500, the said retained payment of \$3,500 being the sum of \$500 a day for seven working days retained by defendant as agreed and liquidated damages because the said contract had not been completed within seven hundred and twenty calendar days from the time of entering into the same. The plaintiff herein did on [155] said 13th day of June, 1936 return the amount so paid to plaintiff by defendant, with its said purported notice of rescission.

At no time before said attempted rescission, nor at any time thereafter, did the plaintiff demand of defendant the payment of said sum of \$3,500 or any part thereof or protest against the withholding of the same or any part thereof, nor make upon the defendant any demand whatever therefor or for any part thereof, but quit and abandoned said work and refused to proceed further with the same.

At no time after the tender by defendant to plaintiff of said sum of \$148,586.98 or after the plaintiff had knowledge that said defendant had deducted the amount of liquidated damages hereinbefore referred to did the said plaintiff request the

District Engineer of defendant to make any determination on said matter or to determine the said or any other question in relation to the said work and materials furnished by the plaintiff or the performance of said contract or to the fulfillment or interpretation of any clause in the specifications, but the said plaintiff on June 13, 1936, did serve and file its said notice attempting to rescind said contract and did entirely cease all work on said project and did refuse to continue to perform any work under said contract, and ever since has and still continues so to refuse, without making any demand whatever upon defendant District to make the said payments so withheld or to have the matter determined by the District Engineer, or to submit any matter in dispute between plaintiff and defendant to said District Engineer.

The total contract price for the performance of said work was and is a sum in excess of \$3,500,000. When the said plaintiff abandoned said work the work to be performed under said contract was about seventy per cent complete. [156]

XIV.

Finds:

(1) That defendant withheld said sum of \$3500 as agreed and liquidated damages because of the failure of plaintiff to complete said contract within the specified time and under an honest belief that the defendant had the right so to do and was required so to do by the provisions of the agreement between the parties, and finds that defendant at all

times was ready, able and willing to submit the matter to the District Engineer for determination in accordance with the provisions of subdivision (e) of Section 6 of the specifications, as above found.

(2) With reference to the claim of rescission based upon defendant's failure to grant an extension of time, in this connection the court finds that plaintiff asked for such an extension of time for 180 days on the 10th day of June, 1935, which request was refused by defendant on the 12th day of July, 1935; that said plaintiff was requested by the District Engineer to specify and itemize the reasons for its request for an extension of time but no such itemized request was ever submitted. Finds that on the 8th day of May, 1936 plaintiff requested 600 days extension of time to complete said work but did not specify or itemize the reasons for the amount of time it was asking for any specific portion of the work upon which it claimed it was delayed, nor submit any evidence in connection with such request; that such request for 600 days extension of time was denied by the District and written notice thereof delivered to plaintiff on May 14, 1936.

(3) The court finds that said request for an extension of time for 600 days was unreasonable and that the said work could have been completed by plaintiff within 200 days from June 13, 1936; said request was not itemized so the District or the District Engineer could determine how many days

the plaintiff [157] claimed to have been delayed for any of the respective matters set forth in said request. Notwithstanding the denial of said first application on July 12, 1935 plaintiff continued with the work until the 13th day of June, 1936 and did receive and accept from defendant during that period of time and on account of said work under the terms of said contract sums in excess of \$1,000,000.00, and notwithstanding the fact that on the 14th day of May, 1936 plaintiff knew that its extension of time for 600 days was denied plaintiff continued with the work until the 13th day of June, 1936.

(4) At no time did plaintiff comply with the request of the District Engineer for any itemization of its various claims for delay, nor did plaintiff present a new and further application for extension of time for any lesser number of days than 600, with specific itemization as to its reasons for various delays and the number of days it claimed to be delayed for any specific cause. The District in denying said extension of time acted in good faith and not arbitrarily or capriciously.

(5) The court finds that the said Contractor was not delayed in said work by any act of God, or by stormy or inclement weather, or by any reason which in the judgment of the District Engineer unavoidably delayed the work, but on the contrary the court finds that the work of the Contractor was not unavoidably delayed and that any delays that occurred were because of the method of work

adopted by the Contractor, and that in passing upon all such questions the District and its Engineer acted fairly and honestly.

(6) With reference to the claimed right of rescission by plaintiff because of the claim of plaintiff that there was a difference in underground conditions as such claim is stated in said notice of June 13, 1936, the court finds that the underground conditions were known and ascertained by plaintiff prior to the [158] 1st day of January, 1935; that in addition plaintiff by its contract took the risk of completing the work and of any underground conditions encountered; that it was the obligation of plaintiff under the contract to perform the work and overcome any conditions that might be encountered in the performance thereof, and that notwithstanding plaintiff's claim that such conditions were misrepresented plaintiff continued to perform the contract after full knowledge of all conditions for more than eighteen months before it abandoned the contract and during such period did accept from defendant sums in excess of \$1,500,000.00 as compensation for said work; and the court finds that with full knowledge of said conditions from almost the inception of the contract plaintiff continued with said work for more than one year after entering into said contract without making any complaint that underground conditions were different than those plaintiff claims to have anticipated. Finds that defendant at no time made any misrepresentations to plaintiff.

(7) The court finds that as early as the 26th day of December, 1934, plaintiff made a claim on defendant that defendant was not furnishing points, lines and grades, and other engineering work which plaintiff claimed defendant should furnish it under the contract. In this connection the court finds that the defendant furnished plaintiff all the engineering work required to be furnished under the agreement, and further finds that as early as the 22nd day of January, 1935 defendant communicated in writing its position to plaintiff and informed plaintiff that defendant would not furnish the additional engineering demanded by plaintiff; that notwithstanding plaintiff's knowledge of the position taken by defendant with reference to this claim plaintiff continued to work under said contract until the 13th day of June, 1936, and from the time of first making said claim until cessation of work [159] plaintiff received from defendant sums in excess of \$1,400,000.00 in connection with work under said contract.

(8) The court further finds that as to all matters stated in said notice of rescission, at no time did plaintiff request that these or any of them be submitted to the District Engineer of defendant in order that said District Engineer might determine any or all questions in relation to said work or materials or the performance of said contract, or any or all questions which had arisen relative to the fulfillment or interpretation of specifications on the part of plaintiff, which specifications at all

times were and are now a part of said contract. The court finds that said District Engineer was never so requested by plaintiff in writing or otherwise, nor was any demand in writing or otherwise ever made by plaintiff upon defendant to have these matters in dispute submitted to said District Engineer for decision.

- (9) The court finds that by the foregoing plaintiff has waived any right, if it ever had any such, to rescind such contract because of the said matters in this paragraph XIV specified and found or as mentioned in said purported notice of rescission, or any of them, and that any right of plaintiff to rescind, if it ever had any such, was and is waived by acquiescence, laches and delay; and the court further finds that in finding any right was waived by acquiescence, laches and delay the court does not intend to and does not find that plaintiff had any right to rescind; on the contrary the court specifically finds that said rescission was without justification or right upon the part of plaintiff, and the quitting of said work and refusing to proceed by plaintiff was an abandonment of the contract and a breach thereof. [160]

XV

Finds that at no time from the time of the entering into of said contract by plaintiff until the abandonment of the said work and contract on the 13th day of June, 1936 did plaintiff before commencing any work which plaintiff claimed was not properly

a part of the work under said contract, notify the District Engineer in writing of plaintiff's objection to the same and refusal to perform such work until notified in writing by said Engineer of his decision in the matter, but on the contrary the said plaintiff without such written objection and without any written decision by said Engineer did continue with said work and did perform all work under said contract until the 13th day of June, 1936, when the same was abandoned by plaintiff as aforesaid.

XVI.

Finds that subsequent to its organization the defendant District caused final surveys, plans, specifications and detailed drawings to be prepared for said project and did include therewith the final estimate of the cost of said project, and the same were approved by the board of supervisors of each of the counties within said District, namely, the Board of Supervisors of the County of Alameda and the Board of Supervisors of the County of Contra Costa, State of California, and by the Director of the Department of Public Works of the State of California, and a certified copy of said final surveys, plans, specifications and detailed drawings and of said estimated cost was transmitted to the Director of said Department of Public Works of the State of California.

XVII.

Finds that after the approval of said final plans and specifications, as aforesaid, the defendant did

cause a notice inviting sealed proposals and bids for the construction of its said project to be published twice in a newspaper of general cir- [161] culation published and circulated within the District, namely, in "The Oakland Tribune," which newspaper was designated for such purpose by the Board of Directors of said District, the first publication of which notice inviting said bids was printed and published on May 7th, 1934 and not less than ten days prior to the time fixed for receiving such bids. Pursuant to said notice bids for the construction and completion of said project were received and opened on the 22nd day of May, 1934, and the bid of plaintiff for the sum of approximately \$3,683,931.00 for the construction and completion of said project and the performance of all work in connection therewith was accepted by defendant and the contract awarded to plaintiff as the lowest responsible bidder; that plaintiff was in fact the lowest responsible bidder for said work.

XVIII.

Finds that thereafter and on the 4th day of June, 1934, pursuant to said call for bids and the bid of plaintiff and the award made to plaintiff by defendant, a contract in writing was entered into between plaintiff and defendant wherein and whereby plaintiff agreed with defendant that plaintiff pursuant to the terms of said contract and for and on behalf of defendant would construct, erect and complete the said project of defendant and do and

perform all work in connection therewith, all as described in said contract and all in accordance with the final surveys, plans, specifications and detailed drawings therefor theretofore adopted by the Board of Directors of said Joint Highway District No. 13, and which said contract, plans and specifications at all times herein mentioned have been on file in the office of the defendant District.

XIX.

Finds that the said contract so let pursuant to the said bid of plaintiff included all work which was to be done in [162] connection with said project, and no other contract with plaintiff was ever let therefor nor for any part thereof, and until said work was abandoned by plaintiff no other call for bids was ever made by defendant and no other final surveys, plans, specifications, detailed drawings or estimates for said work have been made.

XX.

Finds that pursuant to said contract of June 4, 1934, defendant from time to time has paid plaintiff the monthly progress payments provided for in said contract and continued to make such payments up and until the 13th day of June, 1936, on which date plaintiff abandoned said contract and work and refused and thereafter continued to refuse to perform said work or to complete the said project or any part thereof.

XXI.

Finds that said plaintiff has not been requested by defendant to perform any work except the work specified in said contract, and plaintiff has performed no other work for defendant and has made no bid for any other work. The said contract of June 4, 1934 is the sole and only contract and the sole and only understanding between the plaintiff and defendant for the performance of the work specified in said contract.

XXII.

Finds that said final surveys, plans, specifications and detailed drawings so prepared by said defendant District did include a final estimate of cost, which estimate did not exceed the estimate named in the preliminary report of the District Engineer for said project. The bid of plaintiff was within the said final estimate. The purported claim of plaintiff sued upon herein exceeds its said bid and the said final estimate by a sum greatly in excess of ten per cent of said final estimate. There [163] has been no approval by the Board of Supervisors of any County comprising said District or of the Director of the Department of Public Works of the State of California of the said increase in costs sought to be recovered by plaintiff herein. The State of California has contributed a part of the cost of said project, namely, the sum of \$700,000.00.

XXIII.

Finds that each of the cross-defendants herein-after mentioned, at all the dates and times herein mentioned and at the time of the filing of said cross-complaint, was and is now a corporation duly incorporated, organized and existing under and by virtue of the laws of one of the several States of the Union as hereinafter in this paragraph respectively designated for each of said respective cross-defendants:

(a) Hartford Accident and Indemnity Company, a Connecticut corporation;

(b) Fidelity and Deposit Company of Maryland, a Maryland corporation;

(c) The Aetna Casualty and Surety Company, a Connecticut corporation;

(d) Indemnity Insurance Company of North America, a Pennsylvania corporation;

(e) American Surety Company of New York, a New York Corporation;

(f) Maryland Casualty Company, a Maryland corporation;

(g) United States Fidelity and Guaranty Company, a Maryland corporation;

(h) The Fidelity and Casualty Company of New York, a New York corporation;

(i) Glens Falls Indemnity Company, a New York corporation;

(j) Standard Surety and Casualty Company of New York, a New York corporation; [164]

(k) Standard Accident Insurance Company, a Michigan corporation;

(l) Massachusetts Bonding and Insurance Company, a Massachusetts corporation;

(m) Continental Casualty Company, an Indiana corporation.

(n) New Amsterdam Casualty Company, a New York corporation.

XXIV.

Finds that at all the dates and times herein mentioned and at the time of the filing of said cross-complaint the said cross-complainant was and is now a citizen of the State of California, and the respective cross-defendants and each of them in the preceding paragraph mentioned, and the plaintiff and cross-defendant were at all the dates and times herein mentioned and are now citizens of States other than the State of California.

XXV.

Finds that the proceeding on said cross-complaint is one of a civil nature, and the parties to said cross-complaint were at all the dates and times herein mentioned and still are citizens of different States; that the sum involved in said cross-complaint, exclusive of costs and interest, is in excess of the sum of \$3,000.00, the claim of defendant in the prayer of its cross-complaint being for the sum of \$383,568.16.

XXVI.

Finds that on the 4th day of June, 1934, the contract in writing mentioned in paragraph VII hereof was duly and regularly entered into between Six Companies of California, a Nevada corporation, plaintiff herein, and defendant herein, and delivered upon said date by plaintiff to defendant, for the performance of the work hereinbefore mentioned and as hereinbefore found. [165]

XXVII.

Finds that plaintiff as said Contractor did also deliver as part of said contract a certain bond conditioned upon the faithful performance of said contract by plaintiff, which bond was executed by plaintiff and by each of the other cross-defendants. Said bond expressly referred to said contract as that annexed thereto and was made a part of such contract. Such bond above referred to, so made, executed and delivered by plaintiff and by each and every of the other cross-defendants to the defendant and cross-complainant is attached to the cross-complaint of said cross-complainant and marked Exhibit "A". [166]

XXVIII.

Finds that plaintiff proceeded with the work specified to be done in said contract between plaintiff and defendant and continued with said work up to and including the 13th day of June, 1936, upon which date the plaintiff abandoned the said contract and the said work and then and there

refused and ever since has refused to continue with the same or to further perform said agreement or any part thereof.

XXIX.

Finds that upon the abandonment of said work defendant in writing notified plaintiff and cross-defendant and each of the other cross-defendants that it considered the action of plaintiff in refusing to perform said contract an abandonment thereof, and said defendant and cross-complainant caused notice to be served upon plaintiff and cross-defendant and upon each and every of the other cross-defendants to resume work within three days after the receipt of said notice or the said defendant would construe said acts of the plaintiff as a final abandonment of said contract; a copy of which said notice so delivered to the plaintiff and cross-defendant and to all of the other cross-defendants herein is hereinbefore set forth in paragraph X of these Findings, to which reference is hereby expressly made.

XXX.

Finds that notwithstanding the receipt of said notice by said plaintiff and cross-defendant and by each of the other cross-defendants the said plaintiff and cross-defendant, and each of the other cross-defendants, then and there refused and ever since have refused to continue with the said work or to further perform said contract or any part thereof or any of the work thereunder.

XXXI.

Finds that upon the abandonment of said contract by [167] plaintiff it became necessary for defendant (a) to protect and maintain said work in the unfinished state in which it had been left upon the abandonment of said contract; (b) to measure said work in order to call for bids for the completion of the same and to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States for the completion of the work; (c) to readvertise for bids for such completion; and (d) to secure insurance protecting the defendant against loss by fire and against certain other hazards hereinafter mentioned.

In connection with the maintenance and protection of said work it was necessary for defendant to employ engineers, watchmen and laborers, and to secure materials, supplies and equipment. The reasonable cost of all such protection and maintenance at all times herein mentioned was and is the sum of \$47,944.33.

At all times herein mentioned the reasonable cost of measuring said work and of completing said specifications was and is the sum of \$5,134.22.

In order to secure bids for new contracts to complete the work it was necessary to readvertise for such purpose, and at all times herein mentioned the reasonable cost of such advertising was and is the sum of \$1,862.45.

Upon such abandonment by plaintiff the defendant did secure fire insurance protecting the defendant against the hazard of fire to its property and equipment in said project, and did also secure Workmen's Compensation and Liability Insurance protecting the defendant against claims for injury to any of its employees and for damage or injury to others by reason of the operations of the defendant in maintaining and protecting said work; [168] the reasonable cost of all of said insurance at all times herein mentioned was and is the sum of \$14,060.85.

Said sums in this paragraph mentioned in the aggregate amount to \$69,001.85, and at all times herein mentioned were and are reasonable.

XXXII.

Finds that said contract provided for progress payments to be made each month by defendant to plaintiff for work done during the preceding month and said contract also provided for the retention by defendant of a sum which in the aggregate should not exceed ten per cent of the contract price, said retained sum to be paid to plaintiff thirty-five days after the completion of the contract by plaintiff. Prior to said default of plaintiff, defendant had paid to plaintiff the sum of \$2,021,047.11, which sum represented ninety per cent of the contract price for work done by plaintiff for defendant prior to May 1, 1936 and the defendant retained from said progress payments the sum of \$224,560.79, or ten per cent of the contract price, for work done prior

to May 1, 1936. Plaintiff refused to accept the sums tendered by defendant for work performed by plaintiff after May 1, 1936, and defendant has in its possession the sum of \$265,891.82 for all work performed by plaintiff after May 1, 1936, as per estimate, and also the said sum of \$224,560.79 the said retained percentage above referred to, also a credit for plaintiff of \$2,806.55 for partly performed work, said sums aggregating \$493,259.16, less liquidated damages of \$10,000 retained by defendant, the net amount being \$483,259.16.

The reasonable cost of completing the work agreed to be done by plaintiff which remained uncompleted when the plaintiff abandoned the same was and is the sum of \$1,751,611.74. Said sum exceeds the sum specified in said contract of June 4, 1934, to be paid by defendant to plaintiff for such work by the sum of [169] \$591,325.47. The difference between this last mentioned amount and the sum of \$493,259.16 (the aggregate amount still retained by defendant for work done by plaintiff prior to the abandonment of the contract, without any deduction for liquidated damages) is the sum of \$98,066.31, which last mentioned sum is the reasonable increased cost of completing the work over the contract price because of plaintiff's default, less credit to plaintiff for any sums heretofore earned by plaintiff.

XXXIII.

Finds that under the provisions of said contract of June 4, 1934, the time when plaintiff was to com-

plete all of the work expired on the 24th day of May, 1936, and when said work was abandoned by plaintiff on June 13, 1936 plaintiff was in default in the completion of said work for a period of twenty days.

Upon the abandonment of said work by plaintiff it became necessary for defendant to measure said work in order that it could call for bids to complete the same, to prepare and secure approval of supplemental specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States for the completion of the work, and to readvertise for bids for such completion and to enter into contracts therefor. The time required for all of said purposes was one hundred and forty-nine days and the said period of time was and is a reasonable time therefor, and said defendant did proceed with all reasonable dispatch and due diligence so to do.

The first new contract for the completion of the work was entered into on the 9th day of November, 1936, and the reasonable time for the completion of all said work was and is a period of two hundred and sixty-four days from and after said last mentioned date.

The periods of delay in the completing of said work [170] caused by the default of said plaintiff are as follows: A period of twenty days from May 24, 1936, when said time for completion expired, to June 13, 1936 when plaintiff abandoned said

contract; a period of one hundred and forty-nine days, the reasonable time to measure the said work remaining to be done after plaintiff's default in order to call for bids for the completion of the contract and to secure approval of supplemental specifications by the Department of Public Works of the State of California and the Public Works Emergency Administration of the United States, and to readvertise for bids for the completion of said work and to enter into the first new contract therefor; a period of two hundred and sixty-four days, the reasonable time for the completion of all said work after the entering into of said new contract. All said periods of time were and are reasonable and amount in the aggregate to four hundred and thirty-three (433) days delay in the completion of said work, all caused by the action and default of plaintiff.

XXXIV.

Finds that it is provided in said contract of June 4, 1934, that the said contractor, plaintiff herein, shall pay to the defendant as agreed and liquidated damages \$500 for each and every working day which may elapse between the limiting date provided in said contract and the date of the actual completion of the work, and that said sum is specifically agreed upon between the parties as a measure of damage to the defendant by reason of delay in the completion of the work, it being expressly understood and agreed that it would be impracticable to estimate and ascertain the actual

damage sustained by the defendant District because of such delay.

XXXV.

Finds that it is and at all times herein mentioned was extremely difficult to estimate the damage which would be sus- [171] tained by defendant because of any delay in the completion of the project of defendant District. The work to be done by said plaintiff for the defendant consisted of the construction of a highway tunnel and approaches and appurtenances, a portion of one of the main highways in Alameda and Contra Costa Counties; said highway connects with and is a part of the State system of highways at either extremity of said work. Said route is a main artery of travel from the San Joaquin Valley to the congested East Bay area in Alameda and Contra Costa Counties and also leading across the new bridge from the City of Oakland to the City and County of San Francisco. From a large area of the state *is it* a more practical, direct and safer route than any highway now in existence connecting the points above mentioned and is greatly needed by the traveling public.

Defendant's project provides a modern highway of low gradients between Walnut Creek, Contra Costa County, and the business center of Oakland, approximately one and one-half miles shorter than the Claremont Road and approximately two and one-half miles shorter than the Tunnel Road, the previous highways, each of which is a narrow high-

way of steep gradients and sharp curves and which carried a combined traffic in excess of 1,600,000 vehicles per year, all of which traffic can be more safely and economically transported over the new route. The resulting loss, inconvenience and damage caused by the delay in opening the project to use as a public highway is exceedingly great and is and was impracticable of exact ascertainment but exceeds \$500 per day.

In this connection the court further finds that because of plaintiff's abandonment and the necessary delay required for the letting of new contracts, and because of the delay in completing said work, defendant has been and was required until the work was completed to maintain a large staff of engineers and other [172] employees and keep an active District organization intact, all at a reasonable cost to said District of approximately \$272.89 a day, which cost was entirely eliminated upon the completion of said project, which expense to defendant resulted solely from the delay caused by plaintiff's default in the performance of said contract. Said cost and expense in this paragraph alleged is and was in addition to any claim for damage specified in paragraphs XXXI and XXXII of these Findings.

Defendant has financed the cost of said project by the issuance of bonds upon which defendant paid interest, and defendant paid in interest for the said period of four hundred and thirty-three (433) days delay caused by the default of said plaintiff,

without having the enjoyment of said project, a sum in excess of \$89,832.67.

For the reasons above stated and because of the difficulty in ascertaining the actual damage the parties agreed upon liquidated damages as aforesaid.

XXXVI.

Finds that the aggregate damages above referred to are as follows: the sum of \$69,001.85, the reasonable cost of protecting and measuring the work and of the other matters hereinbefore in paragraph XXXI hereof alleged; the sum of \$98,066.31, the increased reasonable cost for completing the contract abandoned by plaintiff in excess of all credits due plaintiff for work heretofore performed by plaintiff for defendant under said contract, as hereinbefore in paragraph XXXII hereof alleged, and the sum of \$142,000.00 as agreed and liquidated damages; said sums amount in the aggregate to \$309,068.16 and no part thereof has been paid.

Finds that defendant is not entitled to any liquidated damages for the period of 149 days between June 13, 1936, when plaintiff ceased work on said project of defendant and the letting of new contracts by defendant to complete said work. That the [173] aggregate number of days for which defendant is entitled to liquidated damages at the rate of \$500 a day is 284 days, amounting to \$142,000.00.

XXXVII.

The court finds that at the time of the filing of said cross-complaint the exact expense of comple-

tion of said contract had not been determined. Finds, however, in this connection it is not a fact that upon the filing of said cross-complaint the said defendant and cross-complainant did not have a cause of action against the cross-defendants but on the contrary finds that it did have such cause of action and that the filing of said cross-complaint was not premature.

XXXVIII.

Finds that the said defendant did proceed to complete the work after the abandonment of said contract by plaintiff in the manner provided in said contract and did not breach the said contract in any way, and that the said cross-defendant Surety Companies are not relieved from liability to defendant under said bond.

Finds that said defendant upon the abandonment of said contract did proceed to call for bids for the completion of said work and let all of said work to the lowest responsible bidders upon contracts regularly called and executed, after due notice for bids.

Finds that the cost of completing said work by said defendant and the amounts expended therefor were and each of them is reasonable.

Finds that none of said cross-defendants is relieved of liability to defendant because of the manner in which defendant completed the work. Finds that no change was made in said work but that the same after the abandonment by plaintiff was com-

pleted by defendant under the exact provisions of the plans and specifications of the contract between plaintiff and defendant. [174]

XXXIX.

Finds that there were no representations by defendant to bidders except such as were contained in the notice to bidders, the proposed contract, and the plans and specifications.

Finds it is not a fact that plaintiff was induced to bid and did bid solely upon the representations contained in the plans, specifications and geological report to which attention of bidders was invited. Finds that plaintiff did not rely upon any representations contained in any geological report in making its bid and that no representations were made by defendant through or by means of any geological report.

Finds it is not a fact that said bid of plaintiff would not have been made except for the representations contained in the plans, specifications and geological report, and in this connection the court finds that said bid would have been and was made without regard to any of the matters and things stated in any geological report.

XL.

Finds it is not a fact that either by the plans or the specifications or any geological report was it represented by defendant to plaintiff that the tunnels to be constructed would be driven through

ground which was self-supporting in character for ninety per cent or more, or for any per cent of the total length of said tunnels; or that the same would be required to be constructed or would be constructed with the use only of temporary timber supports for the excavation of said tunnels, which would be removed before the installation therein of the concrete lining or permanent structure thereof.

Finds that no representations made by defendant to plaintiff were false in any particular. [175]

XLII.

Finds it is not a fact that plaintiff performed any work for defendant in the belief that any representations of defendant other than those contained in the notice to bidders, contract, plans and specifications were true and correct. that except as contained in said documents there were no representations by defendant to plaintiff.

XLIII.

Finds that all moneys expended by plaintiff in the performance of said work were expended for the performance of work required to be done under said contract, and that no extra expenditures were made by plaintiff by reason of any false representations of the defendant.

XLIV.

Finds that the contract entered into between plaintiff and defendant required that the tunnels should be constructed at the location designated in the

plans and specifications regardless of the type or character of the ground, and that plaintiff was obligated under its contract to so construct said tunnels and is not entitled to recover from defendant any compensation therefor except as provided in said agreement between the parties and as already paid by defendant to plaintiff.

XLIV.

Finds that there was no misrepresentation of underground conditions by defendant to plaintiff, and finds it is not a fact that the work required to be done by plaintiff in constructing the tunnels was different from that required by the contract, and the court finds in this connection that plaintiff wrongfully and improperly abandoned said work and agreement and has not performed since said abandonment any work under said contract. [176]

XLV.

Finds that it is not a fact that there was any understanding between plaintiff and defendant or contemplation as to underground conditions, nor were there any representations by defendant as to such.

Finds that the contract was not entered into in the contemplation of both parties, or of either of the parties, that the ground would be self-supporting in said tunnels for ninety per cent or for any length thereof, but finds in this connection that plaintiff as contractor took all risk with reference to said

work and that there was no mistake by either party to said contract as to the true conditions, and finds it is not a fact that by reason of any mistake plaintiff was relieved of any obligation to perform the work under said contract or entitled to rescind same, nor did plaintiff so rescind, but on the contrary the court finds the plaintiff without cause or right quit the work and abandoned the contract.

XLVI.

Finds it is not a fact that plaintiff was ignorant of or mistaken as to the ground conditions to be encountered in the construction of the tunnels at the time it entered into said contract, or that the defendant had knowledge of facts and circumstances from which it knew or should have known or suspected at said time the nature of the ground or the self-supporting character thereof for ninety per cent or any part thereof.

Finds that there was no fraud upon the part of the defendant and that defendant made no misrepresentations as to underground conditions, nor did it in any way fail or neglect to inform plaintiff of any facts within its knowledge. On the contrary the court finds that plaintiff represented to defendant that it was skilled in the trade or calling necessary to complete the work [177] and entered into the contract with full knowledge that defendant not being so skilled relied upon the skill of plaintiff to do and perform the work in a skillful manner and plaintiff guaranteed the work; that said plaintiff so

represented that it was so skilled and did so guarantee the work to defendant; that there were no false or fraudulent representations of any kind made by defendant to plaintiff; that plaintiff had all means of knowledge as to underground conditions that were available to defendant and assumed all risk under said agreement, and expressly agreed to do and perform the work required to be done under the contract for defendant and to overcome any difficulties which might be required in the performance thereof for the compensation specified in said contract.

XLVII.

Finds it is not a fact that by reason of any ground conditions encountered in the construction of the tunnel the doing or performance or construction of the work specified in the contract, plans and specifications ever became or was in fact impossible of performance. Finds that all work was done under conditions which the parties assumed to exist or had a right to assume to exist by reason of the statements of the contract, plans and specifications; finds that the work done was not radically or otherwise different in character to the work required to be performed by plaintiff under the contract, nor was there any different work required as the result of ground conditions or otherwise; finds plaintiff was not called upon to do any work nor did plaintiff do any work of such character different to that contemplated that either in truth or in fact no contract ever existed for the work done by the plaintiff, but

on the contrary the court finds that any work done by plaintiff was entirely within that contemplated by the contract. [178]

XLVIII.

Finds it is not a fact that the failure of the District Engineer to give to plaintiff points, lines and grades was and is a breach of said contract or entitled said plaintiff to rescind said agreement, and in this connection the court finds that said defendant District did furnish to the plaintiff all the engineering data which it was required to do under the agreement. The court also refers to and incorporates as part of this finding the language of subparagraph (7) of Finding XIV hereof.

XLIX.

(1) Finds plaintiff requested defendant and the District Engineer for extensions of time to complete the work, which extensions of time were denied by defendant; finds that defendant in denying said requests did not act arbitrarily or capriciously, nor was any action of the District Engineer in connection with requests for extensions of time arbitrary or capricious or otherwise than in the exercise of his honest judgment.

(2) Finds that the plaintiff was not unavoidably delayed in the performance of said work for any time or for any reason at all.

(3) Finds that any delays which occurred in the performance of said work were caused by the acts of the plaintiff over which it had control.

(4) Finds that neither the District Engineer nor the defendant knew of any causes which unavoidably delayed the plaintiff in the performance of its work under the contract.

(5) Finds it is not a fact that when any requests for an extension of time were made by plaintiff that either the defendant or the District's Engineer failed to grant or refused to grant plaintiff a hearing thereon or to afford plaintiff the opportunity of properly or otherwise presenting the same, but on the [179] contrary finds that plaintiff never requested any such hearing and never submitted the said matter to said Engineer for decision. That at all times the said Engineer fairly and honestly gave plaintiff full opportunity to present any matter to him for decision, and at no time did said Engineer or said defendant act arbitrarily or capriciously or fraudently and at no time did either the defendant or its said Engineer know that plaintiff was entitled to an extension of time or deny the same for any arbitrary or capricious or fraudulent reason or for any other reason except their sincere, fair and honest belief that plaintiff was not so entitled.

(6) Finds it is not a fact that said Engineer failed in any way in his duty to plaintiff or to consider whether plaintiff was entitled to an extension of time or failed to exercise his judgment as to whether the work was unavoidably delayed or failed to perform any of his duties or obligations under said contract, but on the contrary the court finds the Engineer fulfilled all of his duties and obliga-

tions under the contract, especially any toward plaintiff, and that his action was with full knowledge of the facts and his discretion was fairly and honestly exercised.

(7) Finds it is not a fact that the District Engineer did not act upon any of said requests of plaintiff for an extension of time or that the same were denied by defendant without reference to the opinion or judgment of said Engineer.

(8) Finds that the said Engineer did on or about the 1st day of June, 1936 estimate the work performed by plaintiff during the preceding month at the contract price at the sum of \$152,086.98, and that there was tendered to plaintiff the sum of \$148,586.98 and no more, the difference in said sum being the retained liquidated damages of \$500 a day for seven days amounting to \$3500. Previous estimates of the Engineer stated the total [180] value of the work done by plaintiff since the commencement of the contract exceeded the sum of \$2,000,000.00. In this connection the court finds that said plaintiff did work on said project each and every day for the seven days for which the said penalty was retained from and after May 24, 1936. Finds further that said plaintiff never made any demand for the payment of said amount withheld but quit and abandoned the contract without submitting the matter in dispute to the Engineer for decision. Finds that by the withhold of said payment said defendant did not breach the agreement but was acting under and honestly attempting to act under

the said agreement and in accordance with its rights thereunder. Finds no further sum was tendered plaintiff by defendant on account of said progress payment due and payable on June 10, 1936.

(9) Finds it is not a fact that defendant intended to and would have withheld not less than \$120,000 from the plaintiff at the rate of \$500 a day until the completion of the contract, but on the contrary finds that by the abandonment of the contract said plaintiff did not give said defendant any opportunity to adjust the dispute between the parties.

(10) Finds it is not a fact that said defendant in any way breached its said contract with plaintiff in any substantial or material respect or otherwise or at all.

(11) Finds it is not a fact that the consideration for plaintiff's obligation under the contract failed in part or at all because defendant withheld the said sum of \$3500, and finds the withhold of said sum did not justify plaintiff in abandoning the contract.

(12) Finds the failure of defendant to grant an extension of time under the circumstances and the withhold of said sum of \$3500 was strictly in accordance with defendant's rights under the agreement, and did not justify the abandonment of said agree- [181] ment without notice and without an opportunity to adjust the dispute, or to justify said abandonment of said agreement at all, and the

consideration of said contract did not fail because of said acts in any respect at all.

L.

Finds it is not a fact that plaintiff was ignorant of ground conditions to be encountered in the construction of the tunnels at the time it entered into said contract; or that plaintiff could not have determined or ascertained the true conditions of the ground to be encountered prior to the submission of its bid or prior to the execution of the contract between plaintiff and defendant.

Finds that plaintiff was not forced to and did not in fact rely upon representations obtained from the specifications and geological report, or either of them; finds plaintiff was not misled thereby; finds that plaintiff was not mistaken as to the true condition of the ground.

Finds it is not a fact that defendant had knowledge of facts and circumstances from which defendant knew or should have known or could have known or suspected at any time that the ground conditions through which the tunnels would be driven would not be self-supporting either for ninety per cent of the length of said tunnels or for any part thereof.

Finds that defendant did not falsely or fraudulently fail or neglect to inform and acquaint plaintiff with any facts or circumstances with reference to such ground conditions.

Finds it is not a fact that plaintiff entered into the contract with defendant solely or otherwise by reason of the mistaken belief of plaintiff as to ground conditions or by reason of any fraud of defendant.

Finds it is not a fact that plaintiff for any reason [182] was relieved of any obligation to perform said contract or was entitled to rescind the same, but on the contrary finds that there were no misrepresentations of any conditions by defendant to plaintiff and that plaintiff was not entitled to rescind the said contract but its action in refusing to perform the same was a breach thereof. [183]

And from the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW

1. That plaintiff take nothing by its said complaint on file herein or by either count thereof.
2. That defendant and cross-complainant Joint Highway District No. 13 of the State of California, a public corporation, is entitled to judgment against plaintiff and cross-defendant Six Companies of California, a corporation, as follows: For the sum of \$69,001.85, the reasonable cost of protecting and measuring the work as hereinbefore found, after the abandonment of said contract by plaintiff; for the further sum of \$98,066.31, the increased reasonable cost for completing the work after the abandonment thereof by plaintiff in excess of all credits

due plaintiff for work performed by plaintiff for defendant under said contract; and for the further sum of \$142,000.00 as agreed and liquidated damages at the rate of \$500 per day for 284 days' delay, consisting of 20 days' delay in performance of said contract after the expiration date of said agreement and before the abandonment of the same by plaintiff, and for an additional 264 days' delay, the reasonable time for the completion of said work after the letting of new contracts by said defendant upon the default of plaintiff; said sums aggregate \$309,068.16, to all of which defendant and cross-complainant is entitled to judgment against plaintiff.

3. That defendant and cross-complainant is not entitled to any agreed or liquidated damages for the period of 149 days' delay ensuing between the date of June 13, 1936 when plaintiff ceased work on said project of defendant and the date of the letting of new contracts to complete said work by defendant with other contractors. [184]

4. Said defendant and cross-complainant Joint Highway District No. 13 of the State of California, a public corporation, is entitled to judgment jointly and severally against the said plaintiff and against each of the respective Surety Company cross-defendants hereinafter named in the following percentages of said sum of \$309,068.16;

Against plaintiff and the cross-defendant Hartford Accident and Indemnity Company, a Connecti-

cut corporation, in the amount of ten (10) per centum of said sum, to-wit \$30,906.81;

Against plaintiff and the cross-defendant Fidelity and Deposit Company of Maryland, a Maryland corporation, in the amount of ten (10) per centum of said sum, to wit \$30,906.81;

Against plaintiff and the cross-defendant The Aetna Casualty and Surety Company, a Connecticut corporation, in the amount of ten (10) per centum of said sum, to wit \$30,906.81;

Against plaintiff and the cross-defendant Indemnity Insurance Company of North America, a Pennsylvania corporation, in the amount of ten (10) per centum of said sum, to wit \$30,906.81;

Against plaintiff and the cross-defendant American Surety Company of New York, a New York corporation, in the amount of ten (10) per centum of said sum, to wit \$30,906.81;

Against plaintiff and the cross-defendant Maryland Casualty Company, a Maryland corporation, in the amount of six and one-half ($6\frac{1}{2}$) per centum of said sum, to wit \$20,089.43;

Against plaintiff and the cross-defendant United States Fidelity and Guaranty Company, a Maryland corporation, in the amount of six and one-half ($6\frac{1}{2}$) per centum of said sum, to wit \$20,089.43;

Against plaintiff and the cross-defendant The Fidelity and Casualty Company of New York, a New York corporation, in the amount of five (5) per centum of said sum, to wit \$15,453.40; [185]

Against plaintiff and the cross-defendant Glens Falls Indemnity Company, a New York corpora-

tion, in the amount of four and one-half ($4\frac{1}{2}$) per centum of said sum, to wit \$13,908.06;

Against plaintiff and the cross-defendant Standard Surety and Casualty Company of New York, a New York corporation, in the amount of four (4) per centum of said sum, to wit \$12,362.72;

Against plaintiff and the cross-defendant Standard Accident and Insurance Company, a Michigan corporation, in the amount of four (4) per centum of said sum, to wit \$12,362.72.

Against plaintiff and the cross-defendant Massachusetts Bonding and Insurance Company, a Massachusetts corporation, in the amount of four (4) per centum of said sum, to wit \$12,362.72;

Against plaintiff and the cross-defendant Continental Casualty Company, an Indiana corporation, in the amount of two and one-half ($2\frac{1}{2}$) per centum of said sum; to wit \$7,726.70;

Against plaintiff and the cross-defendant New Amsterdam Casualty Company, a New York corporation, in the amount of two (2) per centum of said sum, to wit \$6,181.36.

5. The defendant and cross-complainant is entitled to judgment against plaintiff and each of the cross-defendants hereinabove named for its costs of suit incurred herein.

Let judgment be entered accordingly.

Dated: 22nd September, 1938.

MICHAEL J. ROCHE,

Judge. [186]

Due service and receipt of a copy of the foregoing Proposed Findings and Conclusions of Law as prepared by Defendant is hereby admitted this 12th day of August, 1938.

THELEN & MARRIN
EUGENE E. TREFETHEN
DE LANCEY C. SMITH
J. PAUL ST. SURE

Attorneys for Plaintiff and Cross-
Defendant Six Companies of Cali-
fornia, a corporation.

REDMAN, ALEXANDER &
BACON

Attorneys for all Cross-Defendants
other than Plaintiff.

[Endorsed]: Filed Sep. 22, 1938. [187]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the parties hereto that plaintiff and cross-defendants may have and they are hereby granted to and including the 31st day of August, 1938, within which to prepare, lodge with the Clerk of the above-entitled court and serve upon defendant and cross-complainant herein proposed findings of fact and conclusions of law and such proposed amendments and additions as may be desired by plaintiff and cross-defendants to

the proposed [188] findings of fact and conclusions of law served and filed herein by defendant and cross-complainant.

Dated August 12th, 1938.

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,

Attorneys for Defendant and
Cross-Complainant.

THELEN & MARRIN,
DE LANCEY C. SMITH,
EUGENE E. TREFETHEN,
J. PAUL ST. SURE,

Attorneys for Plaintiff and
Cross-Defendant Six Com-
panies of California.

REDMAN, ALEXANDER &
BACON,

Attorneys for Cross-
Defendants Hartford Accident
and Indemnity Company, et al.

ORDER

Upon reading and filing the foregoing stipulation, and good cause appearing, it is hereby ordered that the time within which plaintiff and cross-defendants may prepare, lodge with [189] the Clerk and serve upon defendant and cross-complainant their proposed findings of fact and conclusions of law and their proposed amendments and additions to the proposed findings of facts and conclusions of law

served and filed by defendant and cross-complainant herein, be and the same is hereby extended to and including the 31st day of August, 1938.

Dated: August 15th, 1938.

MICHAEL J. ROCHE,

District Judge.

[Endorsed]: Filed Aug. 15, 1938. [190] 7

[Title of District Court and Cause.]

**PLAINTIFF'S AND CROSS-DEFENDANTS'
OBJECTIONS AND PROPOSED AMEND-
MENTS AND ADDITIONS TO THE FIND-
INGS OF FACT AND CONCLUSIONS OF
LAW REQUESTED BY DEFENDANT AND
CROSS-COMPLAINANT JOINT HIGH-
WAY DISTRICT No. 13**

Plaintiff and cross-defendants hereby propose the amendments and additions hereinafter set forth to the proposed findings of fact and conclusions of law heretofore served and [193] filed by defendant and cross-complainant Joint Highway District No. 13, in the above entitled action.

Plaintiff and cross-defendants also file herewith their request for findings of fact and conclusions of law which are additional to these objections and proposed amendments and additions to the proposed findings of fact and conclusions of law proposed by defendant, which objections and proposed amendments and additions are as follows:

1.

Strike out all of the said defendant's proposed findings of fact and conclusions of law and substitute in lieu thereof the findings of fact and conclusions of law proposed by plaintiff and cross-defendants and filed herewith.

In the event that the request in paragraph number 1 is not granted, plaintiff and cross-defendants request that the following amendments and additions be made to defendant's proposed findings of fact and conclusions of law:

1.

Strike out lines 1 to 28, inclusive, on page 2 of defendant's proposed findings and substitute lines 1 to 29, inclusive, on page 2 of plaintiff's and cross-defendants' proposed findings.

2.

Strike out all of paragraph V of the proposed findings of fact and substitute in lieu thereof the following:

"Within two years prior to the filing of the complaint in this action defendant became indebted to plaintiff in the sum of \$4,499,073.64 for work done, labor performed and materials furnished by plaintiff to defendant at the special instance and request of defendant. Defendant has paid to plaintiff \$2,021,047.11 on account of said indebtedness and no more and there is now due, owing and unpaid from defendant to plaintiff [194] on account thereof the

sum of \$2,478,026.53, plus interest thereon at the rate of 7% per annum from June 13, 1936 to date of judgment."

3.

Strike out "4th" in paragraph VII, page 4, line 18, and substitute "14th" in lieu thereof.

4.

Insert in paragraph VIII, page 5, line 18, between the word "month" and the word "from", the words "except the months of May and June 1936."

5.

Strike out the words "abandoned said work and" in the third line of paragraph IX on page 5.

Strike out the words "abandonment and attempted" in the fifth line of paragraph IX on page 5.

Insert the words "of said contract" after the word "rescission" in line 1 on page 6.

6.

Strike out the words "and that on said date said defendant wrongfully abandoned the said work and contract between plaintiff and defendant" appearing in the fourth, fifth and sixth lines of paragraph XI and substitute in lieu thereof the following: "and plaintiff was justified in so refusing to proceed."

7.

Insert after the word "contract" in paragraph XII, line 23, page 9, the following: "unless ex-

tended in accordance with the provisions of the contract”.

Strike out the word and figures “May 24, 1936” in paragraph XII, subparagraph (1), line 27, page 9, and substitute in lieu thereof the word and figures “June 3, 1936.” [195]

8.

Strike out all of paragraph XIII, commencing on page 23, and substitute in lieu thereof plaintiff’s and cross-defendants’ proposed findings of fact numbers 69 to 73, inclusive.

Add to said paragraph XIII the following:

“When the district engineer of defendant signed said estimate for May, 1936, he made his determination and decision that said amount of \$3,500.00 should be deducted from the progress payment due plaintiff for work done in May, 1936, and the delivery of said estimate to plaintiff was notice to it of such determination and decision. Said engineer already having determined and decided the matter, plaintiff was under no duty or obligation, under said contract, or otherwise, to make any further request or demand of said engineer for its determination.”

9.

Strike out all of paragraph XIV, commencing on page 25.

In lieu of subparagraph (1) of paragraph XIV substitute the following:

“Defendant withheld said sum of \$3,500.00 from the progress payment due plaintiff for work done

in May, 1936, after the determination of the district engineer that it should be withheld. Said determination of said engineer was capricious, arbitrary and wrongful and the action of defendant in making said deduction was a material breach of said contract entitling plaintiff to rescind the same."

In lieu of subparagraphs (2), (3), (4) and (5) of paragraph XIV substitute plaintiff's and cross-defendants' proposed findings of fact numbers 29 to 68, inclusive, filed herewith.

In lieu of subparagraph (6) of paragraph XIV substitute the following:

"With reference to the right of rescission by plaintiff [196] because the ground conditions encountered in driving the tunnels differed from those represented by defendant to plaintiff before said contract was executed, the Court finds that said ground conditions actually encountered did differ materially and radically from those represented by defendant to plaintiff and that because of such difference in ground conditions the cost, difficulty and time required for constructing said tunnels was greatly increased over what it would have been if said ground conditions had been as represented. While plaintiff knew, as early as January 1, 1935, that the ground encountered in driving the first 92 feet of the south tunnel and 110 feet of the north tunnel had been much worse than represented by defendant, it had no knowledge, or means of knowing, that the remainder of the ground through which the tunnels would be driven would be different from

that represented by defendant and plaintiff did not have, and could not have acquired, such knowledge until the ground was actually excavated. In April of 1935, plaintiff complained to said district engineer of said ground conditions and thereafter on several occasions plaintiff complained both orally and in writing to said district engineer and to the Board of Directors of defendant of the difference in said ground conditions."

In lieu of subparagraph (7) of paragraph XIV substitute paragraph number 74 of plaintiff's and cross-defendants' proposed findings of fact filed herewith.

In lieu of subparagraph (8) of paragraph XIV substitute the following:

"On frequent occasions plaintiff discussed with the district engineer of defendant all of the matters set forth in said notice of rescission, excepting said deduction of \$3,500.00 from the progress payment due plaintiff for work performed in May, 1936, and said Engineer was at all times thoroughly [197] familiar with them and the controversy between the parties respecting them. The matter of the deduction by defendant of said amount of \$3,500.00 from the progress payment due plaintiff for work performed in May, 1936, was submitted to and decided, arbitrarily, capriciously and fraudulently by said engineer against plaintiff when said engineer signed and certified said estimate for the value of the work done during that month. The right of plaintiff to an extension of time was submitted to and decided

arbitrarily, capriciously and fraudulently by said engineer against plaintiff and plaintiff was notified in writing by defendant of the decision of said engineer.

"The obligation of defendant to furnish points to line and grade was not a matter requiring submission to said engineer but was imposed by the plain and unambiguous terms of the contract which could not be changed by any construction by said engineer. Nevertheless, said engineer considered and purported to decide, that defendant did not have such obligation and attempted to change and modify the terms of the contract so as to relieve defendant of such obligation.

"The controversies over misrepresentation by defendant of ground conditions amounting to fraud and over mutual mistake as to ground conditions and mutual mistake of facts in entering into said contract were matters which said engineer had no right, under said contract, or otherwise, to decide and over which he had no jurisdiction and plaintiff had no obligation or duty to submit said matters to said engineer."

In lieu of subparagraph (9) of paragraph XIV substitute the following:

"Plaintiff did not, by laches, delay or otherwise, waive its rights to rescind said contract.

"Immediately on the failure of defendant to make the [198] progress payment due plaintiff for work done in May, 1936, plaintiff, with promptness and due diligence, rescinded said contract.

"The furnishing by plaintiff of lines and grades for the construction of a part of said tunnels did not constitute a waiver by plaintiff of the obligation of defendant to furnish lines and grades for the remaining work to be done in constructing said tunnels, or of plaintiff's right to rescind said contract for the failure and refusal of defendant to perform said obligation and agreement on its part.

"Plaintiff had the right to rescind said contract on all of the grounds stated in its notice of rescission and rescinded the same with promptness and diligence after the right to rescind arose."

10.

Strike out paragraph XV, page 29, and substitute in lieu thereof the following:

"The additional work done by plaintiff in constructing said tunnels over that described in the contract was not of a kind or character which said contract required the district engineer to authorize in writing before plaintiff proceeded therewith. All of the work of constructing said tunnels was so radically different from and so much more costly and difficult to perform than that described in the contract that plaintiff was not obligated to perform the same for the compensation stated in the contract.

"Plaintiff notified said defendant in August, 1935, in writing, of the radically different nature and character of said work, of its objection to performing same and that it would hold defendant re-

sponsible for the additional cost incurred in constructing the tunnels." [199]

11.

Strike out the date "~~4~~th" in paragraph XVIII, page 30, line 15, and substitute "14th" in lieu thereof.

12.

Strike out the words "included all work which was to be done in connection with said project, and no other contract with plaintiff was ever let therefor nor for any part thereof" in paragraph XIX, commencing in line 31, page 30, and ending in line 2, page 31, and substitute in lieu thereof the following: "was the only contract in writing let by defendant to plaintiff."

Strike out the words "work was abandoned" in paragraph XIX, page 31, line 3, and substitute "contract was rescinded" in lieu thereof.

13.

Strike out paragraph XX, page 31, and substitute in lieu thereof the following:

"Pursuant to said contract defendant from time to time, until the progress payment became due and payable for work done under said contract in May, 1936, paid plaintiff the monthly progress payments which became due and payable under said contract. On June 10, 1936, defendant delivered to plaintiff a progress payment for work done during May, 1936, from which defendant had wrongfully deducted the

amount of \$3,500.00. Plaintiff thereupon rescinded said contract and has not, since June 13, 1936, performed any work thereunder. Said deduction of \$3,500.00 from said progress payment was a material breach of said contract by defendant which entitled plaintiff to rescind the same."

14.

Strike out paragraph XXI, page 31, and substitute in lieu thereof the following:

"Upon rescission of said contract by plaintiff, [200] defendant became liable to pay to plaintiff the reasonable value of the work and labor done and materials furnished by plaintiff to defendant while engaged in performing work under said contract plus a reasonable profit equal to 17½% thereof, less the amounts theretofore paid by defendant to plaintiff."

15.

In paragraph XXII, page 31, line 29, strike out the word "purported."

16.

Add after the word "cross-complaint" in paragraph XXV, page 33, line 19, the words "except Fireman's Fund Indemnity Company and Pacific Indemnity Company."

Add after the word "States" in paragraph XXV, page 33, line 21, the words "that at all times and dates mentioned herein both the Firemen's Fund Indemnity Company and the Pacific Indemnity Company were corporations organized and existing

under the laws of the State of California and citizens of that State, that at all times subsequent to the filing of said cross-complaint and until June 1, 1938, said Fireman's Fund Indemnity Company and said Pacific Indemnity Company were parties defendant to said cross-complaint; that on June 1, 1938, on motion of defendant and over the objection of plaintiff and cross-defendants the said cross-complaint was dismissed as to said corporations."

17.

Strike out the date "4th" in paragraph XXVI, page 33, line 26, and substitute therefor "14th".

18.

Strike out the word "abandoned" in paragraph XXVIII, page 35, line 5, and substitute therefor the word "rescinded." [201]

19.

Strike out the words "abandonment of said work" in paragraph XXIX, page 35, line 10, and substitute therefor the words "rescission of said contract."

20.

Add to paragraph XXX, page 35, the following: "Plaintiff and cross-defendants were justified in so refusing."

21.

Strike out all of paragraph XXXI, commencing on page 35.

22.

Strike out the words "said default of plaintiff," in paragraph XXXII, page 37, line 13, and substitute in lieu thereof the word and figures "June 13, 1936."

Strike out the words "less liquidated damages of \$10,000.00 retained by defendant, the net amount being \$483,259.16" in paragraph XXXII, page 37, lines 25 and 26.

Strike out all of the last two sentences of paragraph XXXII, commencing with the word "Said" on page 37, line 29, and ending with the word "plaintiff" on page 38, line 8.

23.

Strike out all of paragraph XXXIII, commencing on page 38, and paragraph XXXIV, page 39, and substitute in lieu thereof the following:

"Under the provisions of said contract plaintiff was entitled to 720 calendar days from and after June 14, 1934, plus the number of days it was unavoidably delayed in performing said work, which amounted to an additional 498 days, within which to perform said work. Plaintiff was not required to complete said work under said contract until a date after January 3, 1937, at which time plaintiff would have completed all of the work under said contract." [202]

24.

Strike out all of paragraph XXXV, commencing on page 39, and all of paragraph XXXVI, com-

mencing on page 41, and substitute in lieu thereof the following:

"Defendant is not entitled to recover from cross-defendants any damages for delay in completing the work under said contract because defendant breached the same in a material respect entitling plaintiff to, and plaintiff did, rescind the same."

"Furthermore, even had defendant not breached said contract and even if plaintiff had abandoned same, defendant would not be entitled to recover liquidated damages for delay at the rate of \$500.00 per day under said contract because any damage which defendant might have suffered from delay in performing said work is easily capable of exact ascertainment as to kind and amount. Defendant has suffered no actual damages resulting from any delay in the completion of said work."

25.

Strike out the last sentence of paragraph XXXVII, page 42, lines 7 to 12, inclusive, and substitute in lieu thereof the following:

"At the time of filing the cross-complaint said defendant and cross-complainant did not have a cause of action against the plaintiff and cross-defendants, or any of them, and said cross-complaint was prematurely filed.

"Said contract provides, in paragraph 5 thereof, as follows:

'5. That the second party further agrees that if the work to be done under this contract and agreement shall be abandoned, or if this con-

tract shall be assigned by the second party, or if at any time the District Engineer shall be of the opinion, and shall so certify in writing to the said first party that the said work or any part thereof is unnecessarily or unreasonably delayed, or that the said second party is wilfully violating any of the conditions or covenants of this contract, or is executing this [203] contract in bad faith, the said first party shall have the power to notify the said second party to discontinue all work or any part thereof under this contract, and thereupon the said second party shall cease to continue said work or such part thereof as said first party may designate, and the said first party shall thereupon have the power to place such and so many persons, and to obtain by contract, purchase or hire, such animals, carts, wagons, implements, tools, material or materials, by contract or otherwise, as said first party may deem advisable, to work at and be used to complete the work herein described, or such part thereof as the agent authorized to superintend the same may deem necessary, and to use such material as they may find upon the line of said work and to charge the expense of such labor and material, animals, carts, wagons, implements and tools to the second party, and the expense so charged shall be deducted and paid by the first party out of such moneys as may be either due or may at any time thereafter become due to

the said second party under and by virtue of this contract or any part thereof.

‘In case such expense is less than the sum which would have been payable under this contract, if the same had been completed by the said second party, the said second party shall be entitled to receive the difference, and in case such expense shall exceed the last said amount, then the said second party or its bondsmen shall pay the amount of such excess to the first party on notice from the said first party of the excess so due.’

“Even if plaintiff had abandoned said contract, (which the Court finds it did not do) defendant has never complied with said provision of said contract, or notified cross-defendants, or any of them, of the excess cost, if any, of completing said project, over the contract price therefor. Compliance with said provision of said contract is a condition precedent to the commencement of any action by cross-complainant against cross-defendants and as such condition has never been performed by cross-complainant, the cross-complaint should be dismissed.”

26.

Strike out paragraph XXXVIII, page 42, and substitute in lieu thereof the following:

“After rescission of said contract by plaintiff, defendant did not complete the work in the manner in which said contract provided that it should be completed in case of abandonment by plaintiff,

which was to complete it by its [204] own forces, but defendant completed the work by entering into contracts with others to perform the same, which was a breach of the terms of said contract and released cross-defendants and all of them of all liability and obligation to cross-complainant, if any they ever had (and the Court finds that they had none) to pay any excess in the cost of completing said work over the prices stated in said contract for completing same."

27.

Strike out all of paragraphs XXXIX and XL, page 43, paragraphs XLI, XLII, XLIII, XLIV, page 44, paragraph XLV, page 45, paragraph XLVI, commencing on page 45, and paragraph XLVII, page 46, and substitute in lieu thereof paragraphs numbers 5 to 28, inclusive, of plaintiff's and cross-defendants' proposed findings of fact filed herewith.

28.

Strike out all of paragraph XLVIII, page 47, and substitute in lieu thereof paragraph number 74 of plaintiff's and cross-defendants' proposed findings of fact filed herewith.

29.

Strike out all of paragraph XLIX, commencing on page 47, and paragraph L, commencing on page 50.

30.

Add to defendants' proposed findings of fact paragraphs numbers 75 to 78, inclusive, of plain-

tiff's and cross-defendants' proposed findings of fact.

31.

Strike out all of defendant's proposed conclusions of law and substitute in lieu thereof the conclusions of law proposed by plaintiff and cross-defendants and filed herewith. [205]

It is respectfully requested that the foregoing amendments to defendant and cross-complainant's requested findings of fact and conclusions of law on file herein be made and allowed by the Court.

Dated: September 14, 1938.

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IN THE UNITED STATES DISTRICT COURT
OF THE NORTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION

SIX COMPANIES OF CALIFORNIA, a corpora-
tion,

Plaintiff and Cross-Defendant,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE
STATE OF CALIFORNIA, a public corpo-
ration,

Defendant and Cross-Complainant,

and

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation, FIDELITY AND

DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLENS FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Cross-Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[209]

The above-entitled cause came on regularly for trial before the above-entitled court, Honorable Michael J. Roche, Judge presiding, without a jury, a jury having been expressly waived by written stipulation of all the parties hereto heretofore filed in the above-entitled court and cause. Said trial

began on the 12th day of April, 1938; plaintiff and cross-defendant SIX COMPANIES OF CALIFORNIA appearing by its counsel, Messrs. Thelen & Marrin, DeLancey C. Smith, Eugene E. Trefethen and J. Paul St. Sure; defendant and cross-complainant, JOINT HIGHWAY DISTRICT No. 13 OF THE STATE OF CALIFORNIA, appearing by its counsel, Archibald B. Tinning, Esq., and T. P. Wittschen, Esq.; and the cross-defendant SURETY COMPANIES above named appearing by their counsel Messrs. Redman, Alexander & Bacon.

Upon motion of the defendant and cross-complainant, made after the beginning of the trial on the issues made by the cross-complaint and the answers thereto and on the 1st day of June, 1938, the cause of action stated in the cross-complaint of defendant and cross-complainant Joint Highway District No. 13 of the State of California was dismissed as to cross-defendants FIREMAN'S FUND INDEMNITY COMPANY, a California corporation, and PACIFIC INDEMNITY COMPANY, a California corporation.

The dismissal was made over the due and timely objection of plaintiff and cross-defendants.

The court proceeded with the trial of said cause from day to day until concluded, and testimony and exhibits were introduced on behalf of the parties to said action; and now the court being fully advised makes and adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Plaintiff is a corporation duly organized and existing [210] under and by virtue of the laws of the State of Nevada and is and at all times herein mentioned has been, a citizen and resident of the State of Nevada and at all times herein mentioned has been and now is, a duly licensed contractor under the laws of the State of California.

2.

Defendant is a public corporation duly organized and existing under and by virtue of the laws of the State of California and at all times herein mentioned has been and now is a citizen and resident of the State of California.

3.

Each of the cross-defendants, hereinafter mentioned, at all the dates and times herein mentioned and at the time of the filing of said cross-complaint, was and is now a corporation duly incorporated, organized and existing under and by virtue of the laws of one of the several States of the Union as hereinafter in this paragraph respectively designated for each of said respective cross-defendants:

(a) Hartford Accident and Indemnity Company, a Connecticut corporation;

(b) Fidelity and Deposit Company of Maryland, a Maryland corporation.

(c) The Aetna Casualty and Surety Company, a Connecticut corporation;

(d) Indemnity Insurance Company of North America, a Pennsylvania corporation;

(e) American Surety Company of New York, a New York corporation;

(f) Maryland Casualty Company, a Maryland corporation;

(g) United States Fidelity and Guaranty Company, a Maryland corporation; [211]

(h) The Fidelity and Casualty Company of New York, a New York corporation;

(i) Glens Falls Indemnity Company, a New York corporation.

(j) Standard Surety and Casualty Company of New York, a New York corporation;

(k) Standard Accident Insurance Company, a Michigan corporation;

(l) Massachusetts Bonding and Insurance Company, a Massachusetts corporation;

(m) Continental Casualty Company, an Indiana corporation;

(n) New Amsterdam Casualty Company, a New York corporation.

The Pacific Indemnity Company, a California corporation, and the Fireman's Fund Indemnity Company, a California corporation, were parties cross-defendant to the cross-complaint when the trial commenced and until June 1, 1938, when they were dismissed over the objection of plaintiff and cross-defendants.

4.

This action is one of a civil nature between citizens of different States and the amount in contro-

versy exceeds the sum of \$3,000.00 exclusive of interest and costs.

5.

On June 14, 1934, defendant executed a contract in writing with plaintiff which was dated June 4, 1934, providing for the construction by plaintiff for defendant of a project consisting of a highway and two tunnels and appurtenant structures. The work provided for in the contract began at Keith Avenue and Broadway Street, in the City of Oakland, Alameda County, California, from which point highway work and structures, such as overhead crossings, culverts, and similar [212] structures were to be constructed for a distance of about two and one-half miles in a northeasterly direction, at which point the highway entered two tunnels, one for east bound traffic and one for west bound traffic, the work ending just beyond the easterly ends of the tunnels which were each approximately 2,910 feet in length. The easterly end of the work was in Contra Costa County, California, the boundary line between Alameda County and Contra Costa County intersecting the tunnels. The east bound tunnel is also known as the "up grade" or "south" tunnel; and the west bound tunnel is also known as the "down grade" or "north" tunnel. At each end of the tunnels large portal buildings to house ventilating machinery and other equipment were included in the work to be done under the contract. The tunnels were to be constructed on a grade of approximately 4%, rising from the westerly to the easterly ends.

6.

Prior to executing the contract defendant duly complied with all the provisions of the laws of the State of California relating to its formation and the execution by it of contracts for construction work and said contract was duly and regularly entered into in full compliance with the laws of that State.

7.

Said contract was entered into by plaintiff and defendant after defendant had published a call for bids on May 7, 1934, inviting bids to be submitted on May 22, 1934, for the contract for constructing said project. Plaintiff, in response to this invitation for bids, submitted its bid for said contract on May 22, 1934. The bid submitted by plaintiff was the lowest and best bid for said contract and plaintiff was thereafter awarded said contract by defendant.

The call for bids stated that bidders might secure [213] a complete copy of the plans and specifications for the work at the office of the district engineer of defendant.

Prior to submitting its bid plaintiff was furnished by defendant with a copy of the plans and specifications referred to in the call for bids. Said specifications stated, among other things, that a report on the geological structure of the ground through which the tunnels would pass was on file in the office of the district engineer and was available for inspection by prospective bidders.

Prior to advertising for bids for the contract for constructing its project defendant had caused to be

prepared and filed in its office a geological report stating the character, nature and condition of the ground through which the tunnels to be constructed under said contract would be driven. Said report was the one referred to in said specifications and prior to the submission of its bid plaintiff was furnished by defendant with a copy of that portion of said report stating the character, nature and condition of the ground through which said tunnels would be driven.

8.

Said plans, specifications and geological report referred to in paragraph 7 were so furnished by defendant to plaintiff prior to the submission by plaintiff to defendant of said bid and prior to the parties entering into said contract, for the purpose of inducing plaintiff to submit to defendant a bid for said contract and of inducing plaintiff to enter into said contract and for the further purpose of informing plaintiff as to the character and nature of the ground through which said tunnels would be constructed and for the purpose of causing plaintiff to believe that, for most of the length of both of said tunnels, the ground through which they would be constructed would be self-supporting and for the [214] purpose of inducing plaintiff to submit a lower bid than it would have submitted if it had known the actual condition of said ground.

9.

Plaintiff computed its costs, the amount of its bid and the time which would be required to perform

the work under said contract upon the information contained in said plans, specifications and geological report and the same were furnished by defendant to plaintiff for the purpose of causing plaintiff to do so.

10.

Said geological report stated that the ground through which the tunnels would be driven would be self-supporting for most of the length of the tunnels. It concluded with the following statement:

“In a general way the rocks and rock structures that would be encountered in the proposed tunnel are favorable from the engineering standpoint. The strata mostly dip at high angles and are intersected by the tunnel at a high angle to their trend. Such a condition restricts the width of belts that may show local weakness or much water, and presents the strongest arrangement of the type of strata involved, and the easiest to deal with in tunneling.

“Throughout the main belt of cherts, the rocks may be expected to be entirely self-supporting indefinitely; in the fault belt of cherts and in the Orindan, with proper care in driving and handling, the rocks should stand well and be self-supporting except possibly along certain shear zones which may require local reinforcement to withstand local pressure (not general weight). These statements do not refer to any measures that may appropriately be taken to prevent the detachment or falling of

fragments or blocks from the surfaces exposed by the tunnel, but to general support of the mass of rock in the sides and roof of the tunnel.

“Near the portals the rocks will probably be found weak and will require positive support to prevent movement or caving.”

The term “self-supporting” as used in said geological report is a technical term and as customarily used in connection with the construction of tunnels, and as used in said geological [215] report, means that said tunnels could be excavated and lined without the necessity of artificially supporting the ground through which they were to be driven and that said ground would not require support between the time of the excavation of said tunnels and the time of the installation therein of the permanent concrete lining provided for in the specifications.

11.

Said specifications so furnished by defendant to plaintiff contained the following provisions, among others, to-wit:

“(e) Timbering.—The term ‘Timbering’ as used herein shall include all wooden pieces or structures used to support the earth or rock adjacent to any excavation. . . .

“It is the general intent of these specifications that all timbering shall be removed from the excavation before concrete is placed. Should conditions arise where, in the opinion of the District Engineer, it is impracticable to remove

certain timbers or structures, such timbering, upon the written consent of the District Engineer, may be permitted to remain, subject, however, to the provisions herein contained in respect to clearances outside of the concrete lining. Timbers allowed to remain in place shall in no case project into the neat lines of the concrete structure, and, in the event that it is apparent, during the process of excavation and timbering, that the safety of the excavation will require timbering to remain in place, the Contractor shall enlarge the excavated section to the extent necessary to set the timbers outside of future concrete lines; timbers found to project within the concrete lines shall be removed and reset before concreting. Permission to allow timbers to remain will not be granted for any other reason than to secure the safety of the structure.

"Where timber is allowed to remain it shall be keyed or wedged firmly against the adjacent rock or earth, and shall be securely fastened, spiked or bolted so that no movement, shifting or settlement shall occur. . . .

"Timbering shall be placed in such a manner as to be readily removed, without endangering the safety of the excavation or causing weakness or excessive stresses in adjacent timber sets or concrete structures, and any damage which may occur shall be remedied by the Contractor at his own expense, including the removal and replacement of any concrete which

has, in the judgment of [216] the District Engineer, been damaged or subjected to excessive loads on account of such operations.

“Lagging behind timber sets shall be restricted to the least extent consistent with safety, and, if, in any case, permitted by the District Engineer to remain permanently in place, shall be so spaced as to permit the unrestricted flow of concrete through the lagging to fill any spaces between the lagging and the excavated surfaces.”

(Section 32, subdivision 5 (e).)

“Types of Tunnel Section.—Two typical tunnel sections are shown on the plans. The District Engineer shall determine which section shall be used in any specific location in order to meet varying conditions which may be encountered. In general, it is expected that the Type “A” section will be used throughout the major length of the tunnels, but if conditions arise which, in the judgment of the District Engineer, require the use of Type “B” section, the Contractor shall make such modifications in construction as may be necessary.”

(Section 32, subdivision 5 (g).)

“... Where timber is employed for tunnel timbering it shall be removed before any concrete is placed, and any spaces outside the neat lines of the concrete structure caused by such removal shall be filled with concrete as above.

provided. In the event that it is found impracticable, in the opinion of the District Engineer, to remove timbering or portions thereof, such timbering may be allowed to remain permanently in place, but in no case shall such timber so remaining be allowed to project into the neat lines of the concrete structure. Where timber is permitted to remain, all spaces outside of the neat lines of the concrete structure shall be filled with concrete mixed in the same proportions and placed at the same time as the concrete in the neat structure. . . .”

(Section 32, subdivision 5 (b).)

The portions of the specifications last hereinabove quoted placed the obligation upon the contractor to remove, prior to installing the concrete lining in the tunnels, any timber theretofore placed therein. These clauses in the specifications implied that the tunnels would be constructed through self-supporting ground, and were improper clauses to place in specifications for the construction of tunnels in ground of the kind actually encountered in the construction of the tunnels here [217] involved. Said clauses were likewise a representation to the bidder and the contractor that the ground through which the tunnels would pass was, and would be found to be, self-supporting, and ground which would stand without artificial support until the installation of the permanent concrete lining therein.

12.

When tunnels are constructed through ground that is not self-supporting, timber cannot practically be removed before the concrete lining is placed and said provisions of said specifications constituted representations by defendant to plaintiff that the ground through which said tunnels would be constructed would be for the most part self-supporting and confirmed the statements in said geological report as to the self-supporting character of the ground through which said tunnels would be driven.

13.

The specifications contained no provision describing or requiring any permanent timbering nor did the plans contain any drawing or description of the manner of, or lay-out for, installing any timbering. It is customary to include a plan, or lay-out, for timbering in the plans for a tunnel when installation of permanent timber supports is expected to be necessary or proper.

14.

The absence of any such plan, or lay-out, in these plans and specifications justified plaintiff in believing that defendant believed that no permanent timber supports for the ground would be necessary and further confirmed the statements in the geological report that the ground through which the tunnels were to be constructed would be, for the most part, self-supporting. [218]

15.

Defendant also directed the attention of plaintiff, prior to the submission of its bid, to a test bore or drift at the site of the proposed tunnels and immediately to the west thereof and on the line of one of the tunnels, which drift was approximately 125 feet long. This test drift ended in firm self-supporting rock. Defendant also directed the attention of plaintiff to certain test pits which defendant had caused to be dug over and along the line of the tunnels and to ground exposures in the neighborhood of the tunnels to be constructed.

16.

Plaintiff's attention was directed to said test bore or drift for the purpose of informing plaintiff as to the character of the ground to be encountered in excavating said tunnels. Plaintiff relied upon the information it derived from its inspection of the test drift in formulating and submitting its bid and in making its estimate of the cost of construction of the tunnels and in planning its methods of doing the work in the tunnels.

None of the ground encountered by plaintiff in excavating the tunnels was of a self-supporting kind or character as was the rock at the end of the test drift.

17.

Plaintiff was furnished by defendant, prior to submitting its bid, with an estimate, made by defendant's engineer and adopted by the defendant,

of the cost of constructing said tunnels, which estimated cost was \$2,010,800.00 and which was approximately the cost estimated by plaintiff for constructing said tunnels in determining the amount of its bid for said contract.

18.

Defendant's engineer, in making said estimate of the [219] cost of constructing said tunnels, did so in the belief that the ground through which they would be constructed would be self-supporting and of the character described in the geological report and specifications. Had said engineer, at the time he made said estimate, known the actual condition of said ground, his estimate of the cost of constructing said tunnels would have been much greater.

19.

Plaintiff, prior to submitting its bid, employed engineers and men with long experience in constructing tunnels, to make an investigation of the proposed project of defendant and to prepare an estimate of the cost of constructing said project as a basis for a bid to be submitted by plaintiff to defendant. Said persons so employed by plaintiff made such investigation, read and examined said specifications and geological report, and examined said plans and estimate of costs furnished to plaintiff by defendant. Said persons, in making said estimate of costs, believed, in good faith, said statements in said geological report that the ground through which said tunnels were to be driven would be self-sup-

porting and the statements in said specifications confirmatory thereof that the timber, if any was required, could be removed before the concrete lining was placed in said tunnels and relied upon the truth and accuracy of said statements in making an estimate of the cost of doing said work and of the time which would be required to do the same. Said persons also, in making said estimate, relied upon the design of said tunnels, as disclosed by said plans, which also confirmed the statement in the geological report that said ground would be self-supporting.

20.

Because of said statements in said geological report and said specifications with respect to timbering and the [220] removal thereof, the design of said tunnels as disclosed by said plans, the estimate of costs of constructing said tunnels prepared by defendant's engineer and the character of ground disclosed by the test drift and test pits shown to plaintiff by defendant, plaintiff was led to and did in fact believe, at and prior to the time of the submission by it to defendant of its bid for the contract and at and prior to entering into the contract, that the ground to be encountered in driving and excavating said tunnels would be of the character described in the geological report and would be self-supporting and plaintiff's bid for the contract was prepared and delivered by it to defendant and the contract was entered into by plaintiff, in said belief and in full reliance on said information furnished

to it by defendant. Plaintiff would not have submitted said bid nor entered into said contract except for its belief that said statements and information were true.

21.

Prior to the submission of its bid said persons employed by plaintiff visited the site of the proposed tunnels on several occasions and made a careful inspection of the test drift and test pits exhibited to them by defendant and also made a careful examination in the vicinity of the site of the tunnels of rock exposures of the character described in the geological report furnished by defendant. Nothing was disclosed by such examinations which indicated that said statements in said geological report and said specifications were not true and correct. Insufficient time was provided between the publication of notice to bidders and the date of receiving bids, for plaintiff, or any bidder, to make test borings along the line of the tunnels or to have a geological study made of the ground conditions through which same would be driven in order to verify the statements made in the geological report and [221] specifications as to the self-supporting character of the ground and the examination and investigation made by plaintiff's representatives of conditions at the site of the work was as complete and full an examination as reasonably could have been made within the time available. It is not customary for bidders on tunnel projects to make borings or geological investigations of ground

through which the tunnels are to be constructed. Plaintiff and its employees and representatives were entitled to, and did, rely on said information furnished to them by defendant in making their estimate of the cost of constructing said tunnels and the time which would be required to construct the same. Plaintiff did not know, at or prior to the time it entered into said contract, the actual nature, character and condition of the ground through which said tunnels were to be constructed, or that it was not self-supporting.

22.

In making its estimate of the cost of constructing said tunnels and the time which would be required to construct the same, plaintiff planned and developed a definite method of procedure which it proposed to follow, which plan of procedure was based on the statements in the geological report as to the character of ground which would be encountered, the provisions of the plans and specifications confirmatory thereof and its examination of ground conditions at the site which also confirmed the conclusions stated in said geological report.

23.

Because of the representations and statements so contained in said geological report, plans and specifications concerning the ground conditions which would be encountered in constructing said tunnels, plaintiff, in making its bid and entering into said contract planned to do and perform the work in the manner hereinafter set forth. [222]

24.

Plaintiff planned to excavate the west portals for a distance of forty feet by the circumferential drift method, that is by constructing a series of small drifts around the perimeter of the tunnel, placing the timber and thereafter removing the core. This is the slowest and most expensive method of excavating tunnels and is used only when the ground is not self-supporting. Plaintiff adopted this plan for this section because the geological report stated that it would require support.

In driving through the sandstone formation, immediately east of the west portal section, which said geological report stated would be the first bedrock formation encountered and which would continue for about 700 feet, plaintiff planned to use the wall plate system. This system consists of excavating drifts on each side of the tunnel at about the bottom of the arch of the roof and placing horizontal timbers therein, called wall plates, which are supported by the bottom of the drifts at one end and, where they protrude from the drifts, by vertical timbers inserted under them which rest on blocks on the floor of the tunnel. After the wall plates are in position a ring of material is excavated along the perimeter of the tunnel across the roof from one wall plate to another and timbers are placed which rest on the wall plates and support the roof of the tunnel. The core is then removed.

This system is customarily used where the ground requires some support although not sufficiently un-

stable to require the use of the circumferential drift method and was adopted by plaintiff because plaintiff believed, from the information and data furnished to it by defendant, that the sandstone formation, while not entirely self-supporting, would be ground permitting use of this method. [223]

Plaintiff planned, in driving through the chert and orindan, which, according to the geological report, began at the easterly end of the sandstone formation and extended for about 2,000 feet in each tunnel to the easterly end of each of the tunnels, to use what is known as the "full face" method. Under this method no drifts are driven in advance, but the full face of the tunnel is blasted loose and the material is then removed by power shovels and electrically operated cars. This is the fastest and most economical method of excavating tunnels and is customarily employed where practicable. It can only be employed, however, when the ground through which the tunnels are being driven is self-supporting. Plaintiff planned, after excavating a section of the tunnel by this method, to timber lightly, principally to protect workmen from falling rocks, but did not plan to install timbers in those sections for the support of general weight. Plaintiff planned to use this method of excavation in these sections because of the statement in said geological report that the ground would be self-supporting.

Plaintiff planned to leave the timber in place for a distance of 40 feet easterly from the west portal and in the sandstone section and place the concrete lining against it.

Plaintiff planned to remove the timber from the chert and orindan sections before placing the concrete lining.

Plaintiff planned to excavate the tunnels at an average rate of 10 feet per day each and to complete their construction by December 1, 1935.

This plan of excavating and lining the tunnels was adopted by plaintiff prior to submission of its bid and formed the basis upon which it estimated the cost of doing that part of the work under the contract and the time which would be required to do it. [224]

25.

The progress per day which can be made in excavating a tunnel has a very material bearing on the cost. The more feet per day that are excavated the cheaper the work is done.

26.

If the ground through which the tunnels were excavated had been of the kind and character described in the geological report, which was confirmed by the provisions of the plans and specifications, particularly those concerning timbering and the planned design, and by the test drift and pits shown to plaintiff by defendant, the plan of driving and excavating the tunnels so adopted by plaintiff would have been practicable and feasible and plaintiff could have excavated said tunnels and completed their construction, in the manner it expected to and within the time estimated by it. Plaintiff's plans

were in accordance with good practice in the construction industry in driving tunnels through ground of the character so described. In formulating said plans plaintiff relied upon and was entitled to rely upon, the statements in said geological report, plans and specifications and the information derived from the test drift and test pits exhibited to it by defendant.

27.

Said contract, plans and specifications had been prepared by defendant and the tunnels had been designed by it.

28.

The work to be done in the tunnels consisted of excavating the material through which same were to be driven, and constructing a concrete lining around the outer perimeter of the excavation, which was 2 feet in thickness at the top of the tunnels, increasing in width as same reached the foundation thereof on each side. The concrete lining was to be of the neat thickness shown on the plans without intrusion into the [225] same of any temporary supports erected for construction purposes. There was also provision for building ventilating flues within the lining. The design of the tunnels provided for a clear area between the side walls of approximately 24 feet, and a height from the level of the paved road at the bottom of the same to the top of the arch of approximately 35 feet. At about the spring line of the arch of the tunnels, or about 18 feet above the ground level, a ceiling across the same

without important structural features was designed to be built so as to leave the remaining upper space of the tunnel for a ventilation chamber, so that the traveled section of the tunnel would be about 24 feet in width by 18 feet in height. The ventilating chamber was for the purpose of receiving and discharging air for ventilation through the flues provided in the walls. The work to be done included the necessary excavation and installation of the lining, the ventilating flues, the ceiling, and a pavement slab for a roadway at the bottom of the tunnels, and all work necessary to complete the tunnels under the plans.

The contract also provided for the construction of a heavy invert section for an estimated distance of 200 feet in both tunnels at a price \$75.00 higher per linear foot than for the portion constructed without such invert. The invert was intended to be used at points in the tunnels where the ground conditions were represented to be bad; and the construction of same would have added great strength to the design.

The design of the tunnels was for a long, flat arch side reaching an apex under conditions which indicated the tunnels were expected by the designer to be driven through self-supporting ground, as the design called for slight resistance at and immediately above the spring line of the tunnels to side pressures from the surrounding ground. The portion of the [226] tunnels to be built with the invert section were described in the contract as "Type B"

section, and the remainder of the tunnels were described as "Type A" section. The plaintiff was justified in concluding that only about 200 feet of ground to be encountered in constructing the tunnels would be of difficult character. The flat arch type design of the tunnels was not a design which would be adopted for difficult ground conditions, or which would be safe to construct in ground conditions which were not unusually favorable to tunnel construction.

29.

Said contract, although dated June 4, 1934, was not executed by defendant until June 14, 1934.

30.

The specifications forming a part of said contract contained the following provision:

"Section 4. Time

"(a) Commencement of Work.—The Contractor shall commence work within ten (10) days after the execution of the contract for the work by the Board of Directors and shall continue without interruption unless otherwise directed by the District. At least three (3) days before starting, the Contractor shall notify the District Engineer in writing of the date that work is to commence.

"(b) Completion of Work.—The time of completion of the entire work specified herein shall be within a period of seven hundred and twenty (720) calendar days from the date of

the execution of the contract by the Board of Directors.

“(c) Extension of Time.—The time during which the Contractor is delayed in said work by Acts of God, or by stormy or inclement weather, or by any reason which, in the judgment of the District Engineer, unavoidably delays the work, shall be added to the aforesaid time for completion, provided that the Board of Directors approve in advance the written application therefor, which must be made by the Contractor for such an extension, before the expiration of the time limit fixed herein, or a duly granted extension thereof.

“(d) Damages for Delay. — The parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed [227] as herein provided, it is distinctly understood and agreed that the Contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars (\$500.00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of damage to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be imprac-

ticable to estimate and ascertain the actual damages sustained by the District under such circumstances; and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor."

Subdivision (d) of the foregoing section was contained in the specifications but was not in the contract or bond. There is no provision in the contract or bond providing for liquidated damages for delay.

31.

The date upon which the work was required to be completed, if plaintiff was entitled to no extensions of time, was June 3, 1936.

32.

Plaintiff commenced work under said contract on or before June 14, 1934, and after assembling the necessary plant and equipment started to excavate the cut which formed the approach to the west portals of the tunnels. Excavation of said cut commenced in June of 1934 and was completed about July 28, 1934.

During the excavation of this cut slides occurred, without fault of plaintiff, which increased the required excavation about 20,000 yards over the estimated amount and delayed the work for at least 7 days.

33.

Excavation at the west portal of the tunnels proper was commenced by plaintiff on August 1, 1934, and continued until August 10, 1934, when it became necessary to stop further [228] excavation in the tunnels until the portal building at the west portal could be constructed to such a point that the two operations would not interfere with each other.

Excavation was resumed in the tunnels on August 23, 1934, and carried on continuously thereafter until the drifts had been excavated for a distance of 92 feet in the south tunnel and 110 feet in the north tunnel, the excavation for this distance having been carried on by the circumferential drift system, differing, however, from that which plaintiff planned to use in that, because of the heavy, unstable ground encountered, plaintiff was required to increase the number of drifts, decrease their size and leave the core in until the concrete lining was placed. Excavation was stopped at these points in the tunnels because it was necessary that they be lined with concrete before the winter rains set in and the ground encountered thus far was so unstable that the core could not be removed so as to permit excavation to proceed while the lining was being done.

Excavation of the south tunnel drifts for a distance of 92 feet was completed October 13, 1934, and the concrete lining was completed in that portion of the south tunnel on November 5, 1934. The work was then stopped by order of defendant's engineer for

21 days, after which the core was removed which operation required 13 days.

Excavation of the north tunnel drifts commenced September 1, 1934, and they were excavated and the tunnel lined a distance of 110 feet by October 27, 1934. The work on this tunnel was then stopped by an order of defendant's engineer for 21 days, after which the core was removed which required 8 days.

The ground encountered in excavating these sections of both of these tunnels was heavy, unstable and exerted heavy [229] pressures at all times. It was partly mud, partly badly broken and shattered rock, and was nowhere self-supporting. Plaintiff excavated and lined these portions of the tunnels as expeditiously as possible. The delay beyond the estimated time for excavating and lining these portions of the tunnels was caused by the ground conditions encountered, was unavoidable and was not due to any fault of plaintiff. Said conditions caused a minimum delay of 30 days to plaintiff in the performance of the work.

34.

After plaintiff had completed excavating and lining the portions of the tunnels at the west portals described in paragraph 33 hereof, it resumed their excavation on or about December 5, 1934. It completed excavation of the core in the concrete lined portions of the tunnels and commenced further excavation on the core of the north tunnel on January 5, 1935 and on the core of the south tunnel on January 21, 1935, and thereafter proceeded with the excavation of the tunnels without cessation until

August 21, 1935. Resumption of excavation on the core beyond the concrete lining was necessarily delayed until drifts could be advanced far enough to permit of its removal. From January 21, 1935, to August 21, 1935, the core of the south tunnel was excavated a distance of 1,212 feet, having passed through the sandstone and penetrated the chert for a distance of approximately 450 feet. The core of the north tunnel had been excavated during the period from January 5, 1935, to August 20, 1935, for a distance of 958 feet likewise having passed through the sandstone and penetrated the chert for a distance of approximately 200 feet.

During this period of time plaintiff excavated on the average 4.20 feet of tunnel per day in the north tunnel and 5.69 feet per day in the south tunnel, said averages being based on excavation of full tunnel, including core.

35.

During this entire period as well as during all times [230] while engaged in the construction of these tunnels, plaintiff prosecuted the work diligently and made all progress possible under the ground conditions encountered.

36.

Plaintiff at all times had adequate and sufficient excavating equipment and tools on the work. It prosecuted the work 24 hours a day, except for one shift of six hours Sunday afternoons and except when the work was stopped by defendant's engineer or by other conditions over which plaintiff had no

control. The cessation of work for one shift on Sunday afternoons was necessary to comply with provisions of the contract concerning hours of labor. Plaintiff at all times pursued proper methods of excavation. The failure to make more progress was due solely to the character of the ground.

37.

At no place encountered in said further excavation of said tunnels, with the possible exception of one or two places extending for not more than 10 or 12 feet of the length of the tunnels, was the ground self-supporting. It was broken, treacherous, unstable and developed heavy pressures. The rock was badly shattered and the same and all of the ground required heavy timbering to support it. At no place could it be excavated by the full face method or in accordance with the plan of excavation which formed the basis of the bid of plaintiff.

Because of the character of the ground, as herein found, the timber could not be removed before the concrete lining was placed. Therefore, plaintiff, of necessity, set the timber supports outside the area where the specifications provided that the concrete lining should be placed. This made it necessary for plaintiff to excavate approximately fifteen per centum more material from the tunnels and furnish and install five times more board feet of timber than would have been required had it been able to remove the timbers before the concrete was placed, resulting in increased cost and a longer time for performing the excavation work. [231]

38.

Plaintiff planned on placing the concrete in the lining of the tunnels by the use of a pneumatic concrete gun. This was the customary and only practical method of placing such concrete at the time plaintiff and defendant entered into said contract. The method consists of forcing the concrete by compressed air into the forms.

Plaintiff used this method in placing the concrete in that portion of the tunnels described in paragraph 33.

Because of the requirements of the specifications and the interpretation placed upon them by the engineer of defendant a great amount of difficulty and delay was encountered in attempting to place the concrete lining with the pneumatic gun. Furthermore, when the forms were stripped the concrete so placed was not entirely satisfactory to defendant's engineer and plaintiff was told by defendant's engineer that it would have to devise and use some other method for placing the remainder of the concrete lining in the tunnels.

Subsequent to the execution of said contract there had been developed a machine for placing concrete known as the pumperete, which pumped the concrete into the forms instead of forcing it in by compressed air. This machine had been used successfully for a year or two on certain structures but was still in the experimental stage so far as placing the lining in large tunnels similar to the ones herein involved was concerned.

When the trouble developed in placing the concrete lining with the pneumatic gun, plaintiff communicated with the manufacturers of the pumpcrete with the object of securing one of these machines to place the concrete lining. Many difficulties were encountered in working out a satisfactory design and plaintiff and the manufacturers were not able to accomplish this and get the pumpcrete delivered to the work until June, 1935. In the meantime the excavation proceeded, but no concrete lining [232] was placed because plaintiff had not been able to secure delivery of this machine earlier and placing the lining by pneumatic gun method was not satisfactory to the defendant's engineer. Plaintiff used every reasonable effort to secure delivery, and did secure delivery, at the site of the work at as early a date as possible of equipment which would place said concrete lining in a manner satisfactory to defendant's engineer.

39.

During June, July and early August of 1935, the ground encountered in each tunnel developed increasingly heavy pressure and plaintiff experienced extreme difficulty in placing timbering heavy enough to hold it in place at all. The timber in that part of the tunnels which first had been excavated, which was through the sandstone, in some places had moved in shortly after the excavation at those points because of pressure of the ground at such points. No movement, however, took place at those

points except such as occurred within a few days after the timber supports were placed. On the other hand, the timber supports placed in the chert which was excavated in June, July and August, 1935, were showing movement and heavy pressure and had to be constantly repaired and replaced.

For this reason plaintiff, on August 21, 1935, stopped further excavation in the tunnels until the concrete lining could be installed in the excavated portions of the tunnels to a point approximately 200 feet from the easterly end of such excavated portions.

Plaintiff started to pour and install the concrete lining in the tunnels the first week in July of 1935, with the use of the pumpcrete and continued said pouring and installation thereafter until June 13, 1936. [233]

40.

On August 21, 1935, in certain parts of the tunnels which had been excavated at that time, the timber had been forced by the pressure of the ground into the area where the concrete lining was required by the specifications to be placed. Defendant's engineer insisted that such timber be trimmed or moved back before the lining was placed and in order to comply with his directions and the specifications, plaintiff proceeded to trim the timber in places where the intrusion was slight and to set it back in places where the intrusion was so great that it could not be trimmed sufficiently without weaken-

ing it to the point where it would fail as a support for the ground.

One of the points at which the timber had intruded so far that it had to be reset was at station 114 in the north tunnel, which was a point about 150 feet easterly from the end of the concrete lining which had been installed prior to August 21, 1935. The tunnel at this point had been excavated during February, 1935. Within a very few days after it was excavated at this point the timbers had intruded into the area in which the concrete lining was to be placed. They were braced at the time they intruded into the area of the concrete lining and in August of 1935 had shown no movement for a period of six months.

On August 28, 1935, while timbers were being reset at said station 114 in said tunnel, a cave-in occurred which completely filled the tunnel for a distance of approximately 100 feet. The resetting and retimbering operations were being carried on in a careful and workmanlike manner and in accordance with approved practice and the cave-in was not caused by any fault of plaintiff.

41.

Immediately following the cave-in the Superintendent [234] of Safety of the Industrial Accident Commission of the State of California ordered plaintiff not to do any further work without his approval and ordered that no timbers be reset or trimmed. This limited plaintiff's operations to con-

creting in those portions of the south tunnel where no trimming or resetting of timbers was required to be done.

Plaintiff proposed to defendant on September 1, 1935, that the design of the concrete lining be slightly altered so as to avoid the necessity of removing or trimming timbers. The proposed alteration was approved and authorized by said Commission, but defendant refused, on September 5, 1935, to permit it. On September 14, 1935, plaintiff notified defendant and said Commission that it would proceed to install the lining in accordance with the specifications. On September 19, 1935, the Commission ordered both plaintiff and defendant to stop all operations which involved removing or resetting timbers before concreting, and stated that some plan whereby the timbering would not be disturbed might be submitted to the Commission for approval.

42.

At a hearing held by said Commission on September 24, 1935, a plan for the modification of the concrete lining was submitted by defendant which would eliminate the necessity of trimming and removing timbers. This plan was satisfactory to the Commission.

Immediately following said hearing plaintiff proceeded as rapidly as possible to line with concrete the portions of said tunnels which had been excavated, although formal permission to alter the de-

sign of the concrete lining in accordance with said plan was not given by defendant until November 8, 1935. [235]

43.

The lining of the north tunnel was not completed to such an extent that it was possible, under conditions existing, for plaintiff to resume excavation in that tunnel until December 22, 1935, and in the south tunnel until November 26, 1935.

44.

If the ground through which the tunnels were being excavated had been of the character described in the geological report furnished by defendant to plaintiff it would not have been necessary for plaintiff to have stopped the excavation of the tunnels on August 21, 1935, until the concrete lining had been installed in the excavated portions thereof, but plaintiff could have continued with the excavation of the tunnels at the same time that it was installing the concrete lining in the portions already excavated.

Furthermore, if the ground had been as represented in said report the timbers would not have intruded into the area where the concrete lining was to be placed and it would have been unnecessary to reset or trim any timbers.

45.

The delay in proceeding with the excavation of the north tunnel from August 21, 1935, to Decem-

ber 22, 1935, a period of 123 days, and in proceeding with the excavation of the south tunnel from August 21, 1935, to November 26, 1935, a period of 97 days, was caused by reasons which unavoidably delayed plaintiff in performing the work, namely,

(a) Bad ground conditions differing from those described in the geological report and specifications;

(b) A cave-in which was not the fault of plaintiff;

(c) Delay on the part of defendant and defendant's engineer in failing and refusing to cooperate on a practical plan of proceeding with the work after the emergency resulting from the cave-in; and [236]

(d) Orders of the Industrial Accident Commission of California restricting plaintiff's operations.

Plaintiff commenced removal of the caved-in material in the north tunnel on September 15, 1935, and completed its removal on December 6, 1935. Said caved-in material was removed from said tunnel as speedily as possible.

46.

After excavation was resumed by plaintiff on said tunnels, as stated in paragraph 43 hereof, plaintiff continued to excavate each of said tunnels and line them with concrete until February 22, 1936. The ground continued to be heavy and broken and none of same was self-supporting. It required heavy permanent timbering at all places. At many

points a soft material, known as altered diabase dike, which was not mentioned in the geological report, was encountered.

47.

On February 22, 1936, at the location of one of these dikes, the north tunnel again caved in. The cave-in occurred without warning and unexpectedly at approximately station 126+50 which was a point approximately 1500 feet easterly from the westerly portal of the tunnel. Excavation of this tunnel at this point had been completed 4 or 5 days before February 22, 1936, and the tunnel had been heavily timbered at that same time.

48.

The cave-in was caused by the heavy pressure exerted by the unstable ground and the diabase dike and did not result from any fault of plaintiff.

49.

On February 22, 1936, following the cave-in, the Industrial Accident Commission of California ordered all excavation work on both tunnels stopped until plans for future [237] excavation and driving were approved by the Commission.

50.

On March 16, 1936, the Commission issued and served on the parties an order permitting resumption of excavation in the south tunnel under certain conditions which it imposed and which condi-

tions made the future excavation slower, more difficult and more expensive than would have been the case if plaintiff could have proceeded with the work as it had been proceeding prior to said cave-in. The conditions imposed also made it necessary to obtain new and additional equipment. Plaintiff obtained such equipment as soon as possible, but was unable to obtain it until March 23, 1936, on which date excavation was resumed in the south tunnel.

Removal of the caved-in material from the north tunnel and concreting of that portion of said tunnel was also permitted by said order. However, the same order prohibited further excavation in that tunnel until plans for future excavation and driving were approved by the Commission.

51.

On April 16, 1936, the Commission issued and served on the parties its order permitting resumption of excavation in the north tunnel under conditions similar to those imposed and herein found in connection with the resumption of excavation in the south tunnel and which likewise made the future excavation in the north tunnel slower, more difficult and more expensive than would have been the case if plaintiff could have proceeded with the work as it had been proceeding before the cave-in.

On April 16, 1936, plaintiff had not completed removal of the caved-in material from the north tunnel. The removal of said caved-in material was

accomplished as speedily as possible and was not completed until May 9, 1936. [238]

52.

The delay resulting from stopping the excavation in the south tunnel from February 22, 1936, to March 23, 1936, a period of 31 days, and in the north tunnel from February 22, 1936, to May 9, 1936, a period of 71 days, was caused by reasons which unavoidably delayed plaintiff in performing the work, namely,

(a) Bad ground conditions differing from those described in the geological report and specifications;

(b) The said cave-in of February 22, 1936, which was not the fault of plaintiff; and

(c) Orders of the Industrial Accident Commission of the State of California.

53.

If the ground through which the tunnels were excavated had been self-supporting, plaintiff would have excavated these tunnels a minimum average distance of 9 feet per day each with the forces and equipment which it had and used. The average progress made by plaintiff on the days it was actually engaged in excavation operations was 4-1/2 feet per day which was a normal and fair rate of progress in the ground actually encountered and as great a rate of progress as could have been made. The difference between a rate of progress in exca-

vating said tunnels of 4-1/2 feet per day and 9 feet per day was due solely to the fact that the ground was not self-supporting, which cause was entirely beyond the control of plaintiff.

54.

At the time plaintiff stopped work on June 13, 1936, it had excavated 1,843.5 feet of full tunnel in the north tunnel and 2,425.75 feet of full tunnel in the south tunnel. Because of the ground conditions which existed plaintiff necessarily consumed 237 more days in excavating that part of the tunnels excavated by it than it would have taken if the ground had been [239] self-supporting. This is in addition to the time lost as a result of cave-ins and other causes herein found.

55.

The work to be done under the contract to the west of the tunnels included construction of a modern highway which required the making of an embankment for same as well as making certain cuts and construction of certain structures. Plaintiff planned the doing of its work to construct the embankment in the early spring of 1935 and complete the highway work during the dry summer season of the same year. Stormy and inclement weather, including heavy rains greatly in excess of normal, retarded the work in the spring of 1935, and prevented plaintiff from finishing same so as to complete the paving work during the summer of 1935.

Because of this delay it became and was impossible for plaintiff to complete the embankment and paving work until the spring and summer dry season of 1936; and as a result of the stormy and inclement weather above mentioned, and of the rainfall in excess of normal expectations, plaintiff was necessarily delayed not less than 30 days in the completion of performance of the contract beyond the date fixed in same for such performance.

56.

During the progress of the work the following reasons unavoidably delayed the work for the following number of days:

1. Slides during the excavation of the approach cut to the west portal and additional excavation required in excavating that cut over the estimated amount, a minimum of 7 days.

2. Extremely difficult and unstable ground encountered in excavating the west portal sections of the tunnels, together with the difficulty of placing the concrete lining therein and orders of defendant's engineer requiring that operations be stopped for 21 days until the concrete lining set, a minimum of 30 days. [240]

3. Heavy, unstable ground making it necessary to stop excavation on August 21, 1935, the cave-in of August 28, 1935, and orders of the Industrial Accident Commission resulting therefrom, a minimum of 123 days.

4. The cave-in of February 22, 1936, and the orders of the Industrial Accident Commission resulting therefrom, a minimum of 71 days.

5. Heavy, unstable and difficult ground encountered, which was not self-supporting and which retarded the progress of the excavation while actually being performed, a minimum of 237 days.

6. Stormy and inclement weather, a minimum of 30 days.

The total of said unavoidable delays caused to plaintiff and said work is 498 days. None of said delays, except those stated in subparagraphs 1 and 6, would have occurred if the ground conditions encountered in constructing said tunnels had been as described in said geological report, as they were represented to be from the plans and specifications and as they were indicated to be in the test drift and test pits shown to plaintiff by defendant and as they appeared to be from surface indications at the site of the work. All of said reasons for delay were unavoidable and beyond the control of plaintiff and none of them was due to any fault of plaintiff.

57.

Plaintiff had scheduled the performance of all of its work under the contract, including the tunnel portions thereof, and had advised the defendant of its proposed schedule, furnishing a copy of same to defendant. Plaintiff filed its first construction schedule with the defendant in August, 1934, which showed that all tunnel work would be completed on

December 1, 1935. At the time this schedule was submitted to defendant, plaintiff was not in possession of any information, nor had it discovered any conditions, to cause it to know that it could not conform to the plans on which it estimated the work, as herein found. No comment or objection was made by defendant [241] to the schedule so submitted. In February, 1935, and after plaintiff had encountered the difficulties and troubles herein found at the west portal and in the west portal approach, it had become apparent that the schedule filed in August, 1934, could not be fulfilled, and plaintiff thereupon submitted and delivered to defendant a revised construction schedule to replace the one previously filed. This schedule showed that the contract work would be completed on May 24, 1936. This schedule also showed that concrete lining of any portion of the tunnels east of the west portal area would not begin until six months after excavation began therein. No objection or comment on this schedule was made by defendant to plaintiff; and plaintiff was justified in assuming that the schedule had been approved.

58.

After the cave-in of August, 1935, and about the first of the year 1936, plaintiff submitted and exhibited to defendant a further revised construction schedule to reflect the delays encountered since the schedule filed in February, 1935. This schedule showed a completion of the tunnels and work would

be in the month of October, 1936, or approximately 150 days after the contract time had expired. No objection was made to this schedule by defendant, nor was any statement made by defendant to plaintiff that plaintiff would be held responsible for any failure to complete within the contract time. By reason of delays encountered after the schedule last found, and resulting from the cave-in above found of February 22, 1936, the date of the completion of the project was further postponed until January 3, 1937, or a total of 224 days after May 24, 1936. January 3, 1937, was the earliest date on which plaintiff could have completed the work under the contract. [242]

59.

Both plaintiff and defendant were misled by said geological report, test drift, test pits and surface indications as to the character of the ground which would be encountered in constructing said tunnels. Defendant designed the tunnels and prepared the plans and specifications therefor on the assumption and in the belief that the tunnels would be constructed through self-supporting ground for a distance of approximately 2,000 feet in each tunnel and that the timber could be removed from the portions where the ground was believed to be self-supporting before the concrete lining was placed. It based its estimate of the cost of constructing said tunnels and its stipulation in the contract for the time of performance thereof on said belief and assumption. Plaintiff was likewise misled into the be-

lief that most of the ground through which said tunnels would be constructed would be self-supporting. Plaintiff's belief was based on the statements made in said geological report, the surface indications at the site of the work, the test drift and test pits exhibited to it by defendant, the design of the tunnels as shown on the plans adopted by defendant, the provisions in said specifications requiring the removal of timber before concrete lining was placed and all other provisions of the specifications and contents of the plans, and defendant's estimate of cost of constructing said tunnels.

60.

Both parties to the contract entered into same under a mistake of fact, namely that both of said parties believed at the time said contract was entered into, that said tunnels would be constructed, for at least 2,000 feet of the length of each thereof, through self-supporting ground, whereas the ground through which said tunnels were constructed was not self-supporting at all, except for 10 or 12 feet thereof. Said [243] mistake was material and substantial.

61.

The excavation of tunnels through ground which is not self-supporting is much more expensive and requires much more time than through ground which is self-supporting.

62.

The contract and specifications provided in the main that the excavated material, or muck, from the tunnels would be used to make fills on the highway work between the westerly end of the tunnels and the westerly end of the project; and gave the engineer of defendant power to select such material from the tunnel excavation as he felt proper for such use, and reject the balance. It was not possible for the plaintiff to determine until the highway fills were approximately completed how much material out of the total tunnel excavation would be necessary to complete the fills. No other material than tunnel excavation was provided to be used in these fills under the plans and specifications, except some cut material in making the embankment for same which would be insufficient to complete more than a small portion of such fills. There was no provision in the plans and specifications for disposition of any material from the tunnel excavation at the east end of the tunnels, and it was proper for the plaintiff to plan its procedure in construction to excavate the tunnels entirely from the west end if that could be done within the time limits of the contract.

The time limits as fixed in the contract, when taken together with the representations as to the ground conditions to be encountered in the tunnel as hereinbefore found, confirmed the representation of the geological report and the specifications that

the tunnels would be driven through self-supporting ground; and taken with the provisions providing for the disposition of material at the west end thereof, justified the [244] plaintiff in planning to excavate the tunnels entirely from the west end to the easterly end. There was no provision for disposition of material from the tunnels at the east end, and it is customary for the owner of construction work to indicate where the material is to be placed which is taken from tunnel excavation. It is also customary to excavate tunnels from the lower grade end thereof because of the advantage to be gained in the drainage of water and removal of material. This is particularly the fact when the plans show the material to be taken from the tunnel excavation is to be used at the lower grade end thereof, as was shown on the plans and stated in the specifications for these tunnels.

63.

The contract provided that the highway work which was located west of the tunnels should include a finished pavement on the completed highway grade, and that same should be completed during good weather conditions which would give a dry condition for placing same. The highway was to be placed upon fills or embankments made in large part from material excavated from the tunnels; and plaintiff planned its work to complete same during the dry season of the summer of 1935, and would have completed this work during that period

and season if the tunnels had been excavated in self-supporting ground. Due to the delays in excavating the tunnels arising from the nature of the ground encountered, which slowed up the progress of excavation, the highway grade could not be finished and paved prior to the dry season in the spring and summer of 1936; and it would have been impossible for the plaintiff to complete the paving of the highway portions of the work until after June 4, 1936.

64.

On June 10, 1935, plaintiff filed with defendant a written application for an extension of time of 180 days within [245] which to perform the work under the contract.

On July 12, 1935, defendant, in writing, denied said application.

On July 26, 1935, plaintiff, in writing, renewed its said application to defendant.

Defendant took no action on said renewed application.

On August 28, 1935, plaintiff again made an application, in writing, to defendant, reaffirming its application of June 10, 1935, and requesting such additional time as might be necessary to perform the work.

Defendant took no action on said application.

On May 11, 1936, plaintiff again applied to defendant, in writing, for an extension of time within which to complete the work under the contract.

On May 14, 1936, defendant, in writing, denied said application.

65.

Neither said engineer of defendant nor the Board of Directors of defendant, at any time after the filing of any such applications by plaintiff and prior to the denial thereof, granted to plaintiff any hearing thereon or requested any evidence or further reasons in support thereof, or gave to plaintiff any opportunity to present any evidence or reasons in support of same.

66.

Wallace B. Boggs was the duly appointed and acting district engineer of defendant during all of the time that plaintiff was engaged in the performance of work under said contract. Prior to the filing of said applications for extensions of time and on several occasions during 1935 and 1936, representatives of plaintiff told said engineer that plaintiff was going to file such applications. Said representatives of [246] plaintiff further told said engineer that plaintiff had been delayed by bad weather, bad ground conditions, cave-ins and difficulty in procuring an adequate supply of competent labor.

Said engineer stated to said representatives of plaintiff that plaintiff was entitled to an extension of time because of the bad ground conditions, the cave-in of August 28, 1935, stormy and inclement weather and other causes, but stated further that

any application filed prior to just before the expiration of the contract time was premature and suggested the filing of such an application in April, 1936, and further stated that upon said application being then made, defendant would grant plaintiff a sufficient extension of time within which to complete the work under the contract without any enforcement of penalties. Plaintiff relied upon said statements of said engineer and believed, and thereafter acted upon said belief, that defendant would grant to it a sufficient extension of time within which to complete said work.

Said engineer and the members of the Board of Directors of defendant, at all times had full knowledge of the bad ground conditions encountered by plaintiff in excavating said tunnels, of said cave-ins and orders of said Industrial Accident Commission of the State of California, of the unavoidable delays to the work caused thereby and of all of the facts herein found in connection with the doing by plaintiff of the work of constructing said tunnels. Said engineer and the members of defendant's Board of Directors knew, at the time said applications for extensions of time were filed by plaintiff, that plaintiff had been unavoidably delayed in performing the work and was entitled, under said contract, to an extension of time within which to complete the work.

The decision of said engineer that plaintiff was not delayed in said work by Acts of God, or by

stormy or inclement weather, or by any reason which, in his judgment, unavoidably delayed the work was arbitrary, capricious and so grossly mistaken as to amount to fraud and is not binding on plaintiff and [247] the action of defendant in denying to plaintiff an extension of time within which to perform the work was arbitrary, capricious and so grossly mistaken as to amount to fraud.

67.

Plaintiff was entitled, as of right, under said contract, to an extension of time within which to perform the work thereunder equal to the number of days it had been unavoidably delayed in the performance of the work as herein found.

68.

Plaintiff in no way waived its right to said extension of time.

69.

On June 10, 1936, defendant delivered to plaintiff an estimate signed by defendant's said engineer which certified that plaintiff had performed work during the month of May, 1936, of the value of \$168,985.53. Defendant deducted from said amount 10% thereof to be retained until the completion of said contract in accordance with the terms thereof. Defendant deducted the further amount of \$3,500.00 making the following statement on said estimate in explanation of said deduction: "Deduc-

tions, Damages, Failure to complete within contract time 7 days at \$500.00—\$3500.00". At the time defendant delivered said estimate to plaintiff it delivered to plaintiff a check for \$148,586.98, which was the balance remaining of the value of said work done by plaintiff in May, 1936, as shown by said estimate less said deductions.

70.

On June 13, 1936, plaintiff mailed to defendant said check with a notice of rescission of said contract as follows:

"June 13, 1936

"Joint Highway District No. 13
of The State of California,
1448 Webster Street,
Oakland, California. [248]

"Gentlemen:

"You are hereby notified that the undersigned, Six Companies of California, has elected to and does hereby terminate and rescind the contract dated June 4, 1934, between the undersigned and your District for the construction, erection and completion of the project of said Joint Highway District No. 13 of the State of California, which includes a highway, highway tunnels, and approaches with the appurtenant structures located partly in the City of Oakland, County of Alameda, State of California, and partly in the County of

Contra Costa, State of California, commonly known as the Broadway Tunnel Project.

"Said rescission is made upon the following grounds and each and all of them:

"First: Through your fault the consideration for our obligations under said contract has failed in part in that you have failed and refused to pay us the amount estimated by you to be due us under the monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount estimated by you to be due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract, said deduction being computed at the rate of \$500 per day for each day in May 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30, and a non-working day, Sunday, May 31st. Said deduction was and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any damages for delay in completion of the contract can only be asserted or claimed against the contractor for working days after the contract date for completion.

"Second: That the consideration for said contract has failed in a material respect in that you

have breached said contract by refusing to pay us the amount due us under your monthly estimate for work done during the month of May, 1936. Said failure consists in the deduction by you from the amount due us for such work of the sum of \$3,500 for claimed damages for failure to complete the work under said contract within contract time, said deduction being computed at the rate of \$500 per day for each day in May, 1936 following May 24th, and to and including the 31st day of May, and including such a deduction for a legal holiday, May 30th, and a non-working day, Sunday, May 31st. Said deduction was and is contrary to and in violation of the terms of the contract in that we were and are entitled as a matter of right and of law to an extension of time thereunder for performance of same to a date after May 31, 1936; and was and is further in violation of the provisions of the said contract in that any damages for delay in completion of the contract can only be asserted or claimed against the contractor for working days after the contract date for completion.

“Third: That in failing to pay said sum mentioned in numbered paragraphs First and Second above and by your refusal to grant said extension of time you have breached [249] said contract, and ground for rescission has arisen in our favor.

“Fourth: That your failure and refusal to grant us the extensions of time to which we are entitled as a matter of right and of law for completion of

said contract after May 24, 1936, although we have repeatedly requested the grant of such extensions is a breach of the contract.

"Fifth: Because the ground encountered in the excavation for the tunnels provided for in the contract has been and is entirely and radically different from the character of ground represented to the contractor as that which would be encountered, and which was contemplated and predicted by the contract, geological report, specifications, plans and any and all other documents forming a portion or part thereof.

"Sixth: For your failure and refusal to furnish points, lines and grades for us to work to and other engineering work in the construction of the tunnels as is required to be done or furnished by you by the terms and provisions of the contract and specifications forming a part thereof.

"Seventh: Because the work which is necessarily required to be done to construct the tunnels under the ground conditions actually encountered at their site is not provided for in the contract and was not contemplated by the parties at the time the contract was made.

"Eighth: For any and all other grounds of rescission of said contract of June 4, 1934 which may have heretofore existed or which do now exist in favor of the undersigned.

"We are returning herewith to you your check #1934 dated June 10, 1936 in purported payment

of the estimate for the work done by us during the month of May, 1936.

Very truly yours,
SIX COMPANIES OF
CALIFORNIA
By HENRY J. KAISER
President."

Said check and notice of rescission were received by defendant on June 15, 1936.

Thereafter and on June 13, 1936, plaintiff stopped all work under said contract and did not thereafter perform any work thereunder except that for a few days it operated pumps and kept watchmen at the site to protect the work.

On June 15, 1936, plaintiff notified defendant that it would cease to operate the pumps and maintain the watchmen at midnight of June 16, 1936.
[250]

On June 16, 1936, defendant sent to plaintiff a letter, which was received by plaintiff on or about said date, as follows:

"June 16, 1936

"Six Companies of California
1522 Latham Square Building
Oakland, California

Gentlemen:

"Your letter of June 13, 1936 in which you notified this District of a purported termination and rescission of your contract with this District dated

June 4, 1934, has been received and considered by the Board of Directors of the District, and this reply thereto is made at the direction of the Directors of the District.

“You are hereby advised that Joint Highway District No. 13 of the State of California considers all of the grounds stated by you as a basis for your attempted rescission and termination of the contract are without basis in fact or law; that this District has fully paid all sums required to be paid, performed and done all things required to be performed and done by it under the said contract, and that you, as such contractor, have no valid grounds or reason whatsoever for your attempted rescission and termination of the contract.

“You are advised that your cessation of the work upon the project and your withdrawal of workmen from the construction of the project constitutes an abandonment by you of the work to be done under the contract; that your said acts which unnecessarily and unreasonably delay and continue to delay the work you contracted to perform, and your attempted rescission and termination of the contract, and each and all of them, constitute willful breaches of the contract by you.

“You are further advised that unless you as said contractor resume work on the project and perform the same in accordance with all of the terms thereof within three (3) days of the date of your receipt of this letter, that this District will consider your acts and conduct as aforesaid a final abandonment

of the contract and the work to be done thereunder, and the District will proceed to complete the same in accordance with the provisions of the contract, and that the District will hold you and your bondsmen liable for any and all costs thereof in excess of the contract price and any and all damages to this District by reason of your wilfull abandonment of the work in violation of the terms of your contract with this District dated June 4, 1934.

Yours very truly,

JOINT HIGHWAY DISTRICT
NO. 13 OF THE STATE OF
CALIFORNIA,

By L. V. EATON

Assistant Secretary." [251]

Under date of July 9, 1936, defendant's said engineer made and signed an estimate which stated that the value of the work performed by plaintiff from June 1 to June 13, 1936, both days inclusive, was \$96,906.29. Defendant deducted therefrom 10% thereof to be retained until the contract was completed, in accordance with the terms thereof and deducted the further sum of \$6,500.00 which was explained on said estimate by the following statement: "Deductions, Damages, Failure to complete within contract time this estimate 13 days at \$500= \$6500.00."

Said estimate together with a check for \$80,715.66, being said amount of \$96,906.29 less said deductions was delivered by defendant to plaintiff on

or about July 9, 1936. At the same time defendant again delivered to plaintiff said check in the amount of \$148,586.98, referred to in paragraph 69 hereof.

On July 15, 1936, plaintiff returned both of said checks to defendant and delivered to it at the same time the following letter:

“July 15, 1936

“Joint Highway District #13
of the State of California
1448 Webster Street
Oakland, Calif.

“Gentlemen:

“We hereby acknowledge receipt of your check No. 1934 in the amount of \$148,586.98 and also your check No. 2201 in the amount of \$80,715.66 dated June 10, 1936 and July 9, 1936 respectively.

“By notice dated June 13, 1936, and heretofore delivered to you, the undersigned rescinded said contract for the reasons and upon the grounds stated in said notice. Said checks are hereby returned to you.

Very truly yours,

SIX COMPANIES OF
CALIFORNIA

By HENRY J. KAISER,

Pres.

By T. M. PRICE.” [252]

71.

Defendant never tendered to plaintiff or offered to pay to it the amount of \$3,500.00 which it deducted from the amount of the payment due for work done in May, 1936, or the amount of \$6,500.00 which it deducted from the amount of the payment due for work done in June, 1936, or any part of either of said amounts, but at all times refused to pay the same.

72.

The refusal of defendant to grant to plaintiff any extension of time within which to complete the work under said contract and its action in making said deduction from the payment due for work performed by plaintiff in May, 1936, was a declaration by defendant that it would continue to make deductions at the rate of \$500.00 per day from the payments due plaintiff for work done under said contract from and after May 24, 1936, until all of the work under said contract was completed.

Plaintiff would have reasonably required 224 days after May 24, 1936, within which to have completed the work remaining to be done under said contract and the total amount of the deductions which would have been made by defendant, if plaintiff had not rescinded said contract and stopped work, from payments due and to become due for work done thereunder, would have been \$112,000.00.

The time for performance of the work under the contract did not expire until June 3, 1936. The de-

duction of \$3,500.00 from the amount due for work done in May, 1936, was wrongful and a violation of the rights of plaintiff under the contract and was a breach of the contract by defendant.

73.

Plaintiff was entitled, under the contract, to an extension of time within which to perform the work more than [253] sufficient to enable it to complete the same and the denial by defendant of such extension and its assertion of the right to deduct \$500.00 per day from and after May 24, 1936, until the work under the contract was completed was a material breach of said contract by defendant which entitled plaintiff to rescind said contract and recover from defendant the reasonable value of the work done and labor and materials furnished in the performance thereof.

74.

Said contract obligated defendant and its engineer to set for plaintiff sufficient points to line and grade to work to in constructing said tunnels. Plaintiff, on many occasions, demanded that said engineer set said points, but defendant and said engineer repeatedly refused to do so and never at any time during the construction of said tunnels set any points to line and grade to which plaintiff could work. In order to construct said tunnels plaintiff was at all times required to set the necessary points to line and grade to which to work. The

setting of said points to line and grade was necessary and essential to the construction of said tunnels and must necessarily be done before the excavation thereof could proceed. It was work which must be done before plaintiff could proceed with the excavation of said tunnels.

The promise and agreement of defendant to cause its engineer to set said lines and grades was a condition precedent to the performance by plaintiff of the work of excavating said tunnels and the failure and refusal of defendant to perform said promise and agreement was a continuing material breach of said contract which justified plaintiff in stopping work thereunder and in rescinding the same. The fact that plaintiff set said points to line and grade for constructing a [254] part of said tunnels did not relieve defendant of its obligation to set said points for the work remaining to be done when plaintiff rescinded said contract or waive the right of plaintiff to rescind said contract and refuse to proceed with the work on account of the refusal of defendant to set said points for the work then remaining to be done. At no time, either before or after receiving said notice of rescission, did defendant or its said engineering set, or offer to set, said points.

75.

Plaintiff, from the time of the execution of said contract until it rescinded same and stopped work thereunder, fully carried out and performed all the promises and obligations contained therein on its part to be performed.

76.

Plaintiff, at all times prosecuted the construction work under the contract with diligence and furnished and supplied for the performance of the work all necessary men, equipment, machinery and materials. Plaintiff adopted and used usual, approved and proper construction methods. It made as much progress in performing the construction work as was possible under the conditions encountered and performed the work which it did perform in constructing said tunnels in as short a time as was possible under such conditions. The failure to complete the construction work under said contract before June 4, 1936, was in no way due to any fault or negligence of plaintiff, but was due solely to causes over which it had no control and which unavoidably delayed the work, which causes have hereinbefore been specifically found as facts.

77.

The amount of money expended by plaintiff in perform- [255] ing work under the contract was \$3,828,998.84, which sum was the reasonable cost of the work done by plaintiff prior to rescission by it of the contract. Defendant has paid to plaintiff \$2,021,047.11 and no more.

Plaintiff is entitled to recover from defendant the difference between said reasonable cost of \$3,828,998.84 so expended by it and \$2,021,047.11 paid to it by defendant, which difference is \$1,807,951.73 plus a reasonable profit on the amount so expended

by plaintiff in the performance of the work which plaintiff did under said contract which the Court finds is 17-1/2 per centum of the amount so expended by plaintiff, or \$670,074.80.

78.

The reasonable value of the work done by plaintiff was and is the amount of \$4,499,073.64. [256]

Plaintiff and cross-defendants further move the Court to make the following conclusions of law.

Based upon the foregoing findings of fact the Court makes the following

CONCLUSIONS OF LAW

1.

That plaintiff was entitled under said contract to an extension of time of 498 days within which to complete the construction work thereunder.

2.

That defendant breached its contract with plaintiff in failing and refusing, prior to the expiration of the time stipulated in said contract for the performance of the construction work thereunder, to extend the time of plaintiff for the performance of said work.

3.

That defendant breached its said contract with the plaintiff in failing and refusing to pay the full amount of the installment payments due thereunder and in deducting from the installment payment due plaintiff on June 10, 1936, the amount of \$3,500.00

being the amount of \$500.00 per day as claimed damages for failure to complete the work in the stipulated time. That the total amount of said deductions, which were intended to be, and which would have been, deducted by defendant from installment payments thereafter to become due from defendant to plaintiff under said contract, if plaintiff had continued the work and completed said project would have been \$112,000.00. Said breach was material and entitled plaintiff to rescind said contract.

4.

That immediately after the breach of said contract by defendant arising from said deduction of said amount from [257] the installment payment due plaintiff on June 10, 1936, plaintiff promptly and with due diligence rescinded said contract. That plaintiff did not waive its right to rescind said contract by laches, delay, or otherwise.

5.

That upon the rescission of said contract by plaintiff it became entitled to recover from defendant the reasonable value of the work done by plaintiff while performing said contract.

6.

That plaintiff made timely and proper applications for extensions of time as causes of delay entitling it to same arose, but same were denied by arbitrary and capricious conduct and decisions of

defendant and its engineer which amounted to fraud.

7.

That the work required to be done in constructing said tunnels was so radically different from the work described in said contract and was such a transformation therefrom and was so radically different from the work contemplated by the parties at the time said contract was entered into, that the minds of the parties never met on a contract for performing said work.

8.

That plaintiff and defendant both believed, at the time said contract was entered into that the tunnels described in same would be constructed through ground which, for nearly all of the length of said tunnels, would be self-supporting, and the work was designed in this belief and bid for by plaintiff in this belief and said contract was entered into under a mutual mistake of fact on the part of both parties which entitled plaintiff to rescind said contract.

[258]

9.

That the representations and statements contained in the geological report and the plans and specifications furnished by defendant to plaintiff constituted a warranty as to the ground conditions to be encountered in constructing said tunnels and a warranty that for over 2,000 feet in each of said tunnels the ground would be self-supporting. That

plaintiff relied upon said warranty in entering into said contract. That said representations and statements were not true and the actual ground conditions encountered by plaintiff in constructing said tunnels were so materially different from those so represented by defendant that there was a breach of said warranty and the said warranty and the breach thereof constituted a fraud upon plaintiff which entitled it to rescind said contract.

10.

That defendant breached its said contract in failing and refusing to set sufficient points to line and grade to which plaintiff could work in constructing said tunnels. That the setting of said points was an obligation of defendant which was a condition precedent to the continuance by plaintiff of the work under said contract and the performance thereof. That said obligation was a continuing promise by defendant which it had a continual obligation to perform as the work was done. That the breach by defendant of said contract in refusing to set said points was material and entitled plaintiff to rescind said contract and that plaintiff did not waive its right to rescind said contract for said breach by delay, laches, or otherwise.

11.

That plaintiff is entitled to recover from defendant the reasonable value of the work and labor done and materials furnished by plaintiff to defendant in the performance of said [259] contract to June 13,

1936, less the amount defendant has paid to plaintiff, with interest on the amount unpaid from June 13, 1936, to the date of judgment, at the rate of 7% per annum.

The reasonable value of the work so performed and labor and materials so furnished was and is the amount of \$4,499,073.64. Defendant has paid plaintiff the amount of \$2,021,047.11 and no more, leaving a balance owing from defendant to plaintiff of \$2,478,026.53.

12.

Plaintiff is entitled to judgment against defendant for said amount of \$2,478,026.53 with interest thereon at the rate of 7% per annum from June 13, 1936, to the date of judgment, and its costs and disbursements herein incurred.

13.

Defendant is not entitled to recover any amount on its cross-complaint against plaintiff or against any of the cross-defendants.

14.

All of the cross-defendants are entitled to judgment that defendant take nothing by its cross-complaint and for their costs of suit incurred herein.

Let judgment be entered accordingly.

Dated: _____, 1938.

.....
Judge of the United States
District Court.

[Endorsed]: Lodged Sept. 15, 1938. [260]

In the United States District Court of the Northern
District of California, Southern Division.

No. 20101 R.

SIX COMPANIES OF CALIFORNIA, a corpora-
tion,

Plaintiff & Cross-Defendant,

vs.

JOINT HIGHWAY DISTRICT No. 13 OF THE
STATE OF CALIFORNIA, a public corpora-
tion,

Defendant & Cross-Complainant,

and

HARTFORD ACCIDENT AND INDEMNITY
COMPANY, a corporation, FIDELITY AND
DEPOSIT COMPANY OF MARYLAND,
a corporation, THE AETNA CASUALTY
AND SURETY COMPANY, a corporation,
INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA, a corporation, AMER-
ICAN SURETY COMPANY OF NEW
YORK, a corporation, MARYLAND CAS-
UALTY COMPANY, a corporation, UNITED
STATES FIDELITY AND GUARANTY
COMPANY, a corporation, THE FIDELITY
AND CASUALTY COMPANY OF NEW
YORK, a corporation, GLENS FALLS IN-
DEMNITY COMPANY, a corporation,

STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Cross-Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Michael J. Roche, Judge presiding, without a jury, the jury having been expressly waived by a written stipulation of all parties hereto heretofore filed in the above-entitled Court and Cause; said trial [261] began on the 12th day of April, 1938; plaintiff and cross defendant, Six Companies of California, appearing by its counsel, Messrs. Thelen & Marrin, DeLancey C. Smith, Eugene E. Trefethen and J. Paul St. Sure; and defendant and cross-complainant, Joint Highway District No. 13 of the State of California, appearing by its counsel, Archibald B. Tinning, Esq., and T. P. Wittschen, Esq., and cross-defendants Hartford Accident and Indemnity Company, a corporation, Fidelity and Deposit Company of Maryland, a corporation, The Aetna Casualty and Surety Company, a corporation, Indemnity Insurance Company of North America, a

corporation, American Surety Company of New York, a corporation, Maryland Casualty Company, a corporation, United States Fidelity and Guaranty Company, a corporation, The Fidelity and Casualty Company of New York, a corporation, Glens Falls Indemnity Company, a corporation, Standard Surety and Casualty Company of New York, a corporation, Standard Accident Insurance Company, a corporation, Massachusetts Bonding and Insurance Company, a corporation, Continental Casualty Company, a corporation, and New Amsterdam Casualty Company, a corporation, appearing by their counsel Messrs. Redman, Alexander & Bacon; upon motion of the defendant and cross-complainant, duly and regularly granted by order of the Court, the cause of action stated in the cross-complaint of defendant and cross-complainant, Joint Highway District No. 13 of the State of California, was dismissed as to cross-defendants, Fireman's Fund Indemnity Company, a California corporation, and Pacific Indemnity Company, a California corporation; and the court proceeded with the trial of said cause from day to day until concluded and testimony and exhibits were introduced on behalf of the parties to said action, and [262] at the conclusion of taking said testimony and offering of documents, the case was duly argued and submitted to the court for consideration and decision, and after due deliberation thereon, the court made its findings of fact and conclusions of law in writing thereon, which were duly filed herein, and directed the entry of judgment in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, It Is Hereby Ordered and Adjudged

1. That plaintiff take nothing by its said complaint on file herein, or by either count thereof;

2. That defendant and cross-complainant, Joint Highway District No. 13 of the State of California, a public corporation, do have and recover of and from plaintiff and cross-defendant Six Companies of California, a corporation, the sum of Three Hundred Nine Thousand Sixty-eight and 16/100 Dollars (\$309,068.16).

3. That said defendant and cross-complainant Joint Highway District No. 13 of The State of California, a public corporation, do have and recover, jointly and severally, against said plaintiff Six Companies of California and against each of the respective Surety Company cross-defendants hereinafter named, the following percentages of said sum of Three Hundred Nine Thousand Sixty-eight and 16/100 Dollars (\$309,068.16) as follows:

(a) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant Hartford Accident and Indemnity Company, a Connecticut corporation, ten (10) per centum of said sum, to wit, the sum of Thirty Thousand Nine Hundred Six and 81/100 Dollars (\$30,906.81);

(b) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-

defendant Fidelity and Deposit Company of Maryland, a Maryland corporation, ten (10) per centum [263] of said sum, to wit, the sum of Thirty Thousand Nine Hundred Six and 81/100 Dollars (\$30,906.81);

(c) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant The Aetna Casualty and Surety Company, a Connecticut corporation, ten (10) per centum of said sum, to wit, the sum of Thirty Thousand Nine Hundred Six and 81/100 Dollars (\$30,906.81);

(d) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant Indemnity Insurance Company of North America, a Pennsylvania corporation, ten (10 per centum of said sum, to wit, the sum of Thirty Thousand Nine Hundred Six and 81/100 Dollars (\$30,906.81);

(e) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant American Surety Company of New York, a New York corporation, ten (10) per centum of said sum, to wit, the sum of Thirty Thousand Nine Hundred Six and 81/100 Dollars (\$30,906.81);

(f) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-

defendant Maryland Casualty Company, a Maryland corporation, six and one-half ($6\frac{1}{2}$) per centum of said sum, to wit, the sum of Twenty Thousand Eighty-nine and $43/100$ Dollars (\$20,089.43);

(g) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant United States Fidelity and Guaranty Company, a Maryland corporation six and one-half ($6\frac{1}{2}$) per centum of said sum, to wit, the sum of Twenty Thousand Eighty-nine and $43/100$ Dollars (\$20,089.43); [264]

(h) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant The Fidelity and Casualty Company of New York, a New York corporation, five (5) per centum of said sum, to wit, the sum of Fifteen Thousand Four Hundred and Fifty-three and $40/100$ Dollars (\$15,453.40);

(i) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant Glens Falls Indemnity Company, a New York corporation, four and one-half ($4\frac{1}{2}$) per centum of said sum, to wit, the sum of Thirteen Thousand Nine Hundred Eight and $06/100$ Dollars (\$13,908.06);

(j) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-

defendant Standard Surety and Casualty Company of New York, a New York corporation, four (4) per centum of said sum, to wit, the sum of Twelve Thousand Three Hundred Sixty-two and 72/100 Dollars (\$12,362.72);

(k) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant Standard Accident and Insurance Company, a Michigan corporation, four (4) per centum of said sum, to wit, the sum of Twelve Thousand Three Hundred Sixty-two and 72/100 Dollars (\$12,362.72);

(l) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, a corporation, and against cross-defendant Massachusetts Bonding and Insurance Company, a Massachusetts corporation, four (4) per centum of said sum, to wit, the sum of Twelve Thousand Three Hundred Sixty-two and 72/100 Dollars (\$12,362.72);

(m) Said defendant do have and recover, jointly and severally, against said plaintiff Six Companies of California, [265] a corporation, and against cross-defendant Continental Casualty Company, an Indiana corporation, two and one-half (2½) per centum of said sum, to wit, the sum of Seven Thousand Seven Hundred Twenty-six and 70/100 Dollars (\$7,726.70);

(n) Said defendant do have and recover, jointly and severally against said plaintiff Six Companies

of California, a corporation, and against cross-defendant New Amsterdam Casualty Company, a New York corporation, two (2) per centum of said sum, to wit, the sum of Six Thousand One Hundred Eighty-one and 36/100 Dollars (\$6,181.36);

4. That defendant and cross-complainant Joint Highway District No. 13 of the State of California, do have and recover from plaintiff and each of the cross-defendants hereinbefore named its costs of suit incurred herein taxed at the sum of Eight Hundred Seventy-two and 70/100 Dollars (\$872.70).

Judgment entered September 27, 1938.

WALTER B. MALING,

Clerk.

[Endorsed]: Filed Sept. 27, 1938. [266]

[Title of District Court and Cause.]

NOTICE

To Thelen & Marrin, Balfour Building, San Francisco, California, Archibald B. Tinning, 924 Main Street, Martinez, California, T. P. Wittschen, Latham Square Building, Oakland, California, Redman, Alexander & Bacon, 315 Montgomery St., San Francisco, California.

You Are Hereby Notified that on September 27th, 1938, a Judgment was entered by this office in the above entitled case.

WALTER B. MALING,

Clerk.

San Francisco, Calif., September 27th, 1938. [267]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT [268]

To said plaintiff and cross-defendant and Messrs. Thelen & Marrin, DeLancey C. Smith, Eugene E. Trefethen, and J. Paul St. Sure, attorneys for said plaintiff and cross-defendant; and to said cross-defendants and Messrs. Redman, Alexander & Bacon, attorneys for said cross-defendants:

You and Each of You will please take notice that judgment in the above-entitled action was filed and entered on the 27th day of September, 1938:

1. In favor of said defendant herein and against said plaintiff herein;

2. In favor of said defendant and cross-complainant and against said plaintiff and cross-defendant;

3. In favor of said defendant and cross-complainant, and jointly and severally against said plaintiff and cross-defendant, and against each of said cross-defendants.

Dated this 29th day of September, 1938.

ARCHIBALD B. TINNING,

T. P. WITTSCHEN,

**Attorneys for Defendant and
Cross-Complainant. [269]**

State of California

County of Contra Costa—ss.

**Eugenia Belon, being first duly sworn, deposes
and says:**

That she is a citizen of the United States, over the age of eighteen years, not a party to, nor interested in the foregoing entitled action; that she is a stenographer in the office of Archibald B. Tinning, one of the attorneys at law in the foregoing entitled action for Joint Highway District No. 13 of the State of California, the defendant and cross-complainant therein; that said Archibald B. Tinning has his office in the City of Martinez, County of Contra Costa, State of California, and that Messrs. Thelen & Marrin, one of the attorneys for the plaintiff and cross-defendant Six Companies of California in said action, have their offices in the Balfour Building, in the City and County of San Francisco, State of California; that there is a regular communication by mail between the said City of Martinez and the said City and County of San Francisco; that on the 29th day of September, 1938, affiant served the foregoing Notice of Entry of Judgment on the said plaintiff Six Companies of California, by depositing a true copy thereof, enclosed in a sealed envelope, with the postage thereon prepaid, addressed to:

Messrs. Thelen & Marrin,
Attorneys at Law,
Balfour Building,
San Francisco, California,

in the United States Post Office in the City of Martinez, on the said 29th day of September, 1938; and that the said address of the said attorneys for said

plaintiff and cross-defendant is the last known address of said attorneys.

EUGENIA BELON.

Subscribed and sworn to before me this 29th day of September, 1938.

[Not'l Seal] **HAZEL RICE,**

Notary Public in and for the County of Contra Costa, State of California. [270]

State of California

County of Contra Costa- ss.

Eugenia Belon, being first duly sworn, deposes and says:

That she is a citizen of the United States, over the age of eighteen years, not a party to, nor interested in the foregoing entitled action; that she is a stenographer in the office of Archibald B. Tinning, one of the attorneys at Law in the foregoing entitled action for Joint Highway District No. 13 of the State of California, the defendant and cross-complainant therein; that said Archibald B. Tinning has his office in the City of Martinez, County of Contra Costa, State of California, and that Messrs. Redman, Alexander & Bacon, attorneys for the cross-defendants Hartford Accident and Indemnity Company, a corporation, Fidelity and Deposit Company of Maryland, a corporation, The Aetna Casualty and Surety Company, a corporation, Indemnity Insurance Company of North America, a corporation, American Surety Company of New York, a corporation, Maryland

Casualty Company, a corporation, United States Fidelity and Guaranty Company, a corporation, The Fidelity and Casualty Company of New York, a corporation, Glens Falls Indemnity Company, a corporation, Standard Surety and Casualty Company of New York, a corporation, Standard Accident Insurance Company, a corporation, Massachusetts Bonding and Insurance Company, a corporation, Continental Casualty Company, a corporation, and New Amsterdam Casualty Company, a corporation, in said action, have their offices at 315 Montgomery Street, in the City and County of San Francisco, State of California; that there is a regular communication by mail between the said City of Martinez and the said City and County of San Francisco; that on the 29th day of September, 1938, affiant served the foregoing Notice of Entry of Judgment on the said cross-defendants, by depositing a true copy [271] thereof, enclosed in a sealed envelope, with the postage thereon prepaid, addressed to:

Messrs. Redman, Alexander & Bacon,
Attorneys at Law,
315 Montgomery Street,
San Francisco, California,

in the United States Post Office in the City of Martinez, on the said 29th day of September, 1938; and that the said address of the said attorneys for said cross-defendants is the last known address of said attorneys.

EUGENIA BELON

Subscribed and sworn to before me this 29th day of September, 1938.

[Notarial Seal] HAZEL RICE

Notary Public in and for the County of Contra Costa, State of California.

[Endorsed]: Filed Sep. 30, 1938. [272]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73(b). [273]

Notice is hereby given that Six Companies of California, a corporation, plaintiff and cross-defendant above-named, and Hartford Accident and Indemnity Company, a corporation, Fidelity and Deposit Company of Maryland, a corporation, The Aetna Casualty and Surety Company, a corporation, Indemnity Insurance Company of North America, a corporation, American Surety Company of New York, a corporation, Maryland Casualty Company, a corporation, United States Fidelity and Guaranty Company, a corporation, The Fidelity and Casualty Company of New York, a corporation, Glens Falls Indemnity Company, a corporation, Standard Surety and Casualty Company of New York, a corporation, Standard Accident Insurance Company, a corporation, Massachusetts Bonding and Insurance Company, a corporation, Continental Casualty Company, a corporation, and New Amsterdam Casualty Company, a

corporation, cross-defendants above-named, hereby appeal and each of said named parties does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 27th, 1938.

Dated: San Francisco, California, November 25, 1938.

PAUL S. MARRIN
THELEN & MARRIN
DeLANCEY C. SMITH
EUGENE E. TREFETHEN

1000 Balfour Building,
351 California Street,
San Francisco, California.
Attorneys for Appellant
Six Companies of California.

[274]

JEWELL ALEXANDER
REDMAN, ALEXANDER &
BACON

315 Montgomery Street,
San Francisco, California.
Attorneys for Appellants
Hartford Accident and In-
demnity Company,
a corporation,
Fidelity and Deposit Company
of Maryland,
a corporation,
The Aetna Casualty and
Surety Company,
a corporation,

Indemnity Insurance
Company of North America,
a corporation,
American Surety Company of
New York,
a corporation,
Maryland Casualty Company,
a corporation,
United States Fidelity and
Guaranty Company,
a corporation,
The Fidelity and Casualty
Company of New York,
a corporation,
Glens Falls Indemnity
Company,
a corporation,
Standard Surety and Casualty
Company of New York,
a corporation,
Standard Accident Insurance
Company,
a corporation,
Massachusetts Bonding and
Insurance Company,
a corporation,
Continental Casualty
Company,
a corporation,
New Amsterdam Casualty
Company,
a corporation.

[Title of District Court and Cause.]

NOTICE

To Tinning & De Lap,
924 Main Street,
Martinez, California

T. P. Wittschen,
Latham Square Bldg.,
Oakland,

You Are Hereby Notified that on November 25 1938 a Notice of Appeal was filed by plaintiff & Cross-defendants, in the above entitled case.

WALTER B. MALING,
Clerk.

San Francisco, Calif., November 25th, 1938. [276]

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL.

[277]

Know All Men By These Presents:

That we, Six Companies of California, a Nevada corporation, as principal, and Henry J. Kaiser Company, a Nevada corporation, The Utah Construction Company, a Utah corporation, MacDonald & Kahn Co., Ltd., a Delaware corporation, J. F. Shea Co., Inc., a Delaware corporation, Morrison-Knudsen Company, Inc., a Delaware corporation, S. D. Bechtel, an individual, K. K. Bechtel, an individual, and W. A. Bechtel, Jr., an individual, as sureties, acknowledge ourselves to be indebted to Joint Highway District No. 13 of the State of

California, a public corporation of the State of California, in the sum of Three Hundred and Sixty Thousand and no/100 Dollars (\$360,000.00), lawful money of the United States of America, for the payment whereof well and truly to be made, we hereby bind ourselves, our heirs, administrators, successors and assigns, firmly by these presents as follows:

The principal and Henry J. Kaiser Company, a Nevada corporation, as surety, jointly and severally in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of Henry J. Kaiser Company hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00);

The principal and The Utah Construction Company, a Utah corporation, as surety, jointly and severally in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of The Utah Construction Company hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00);

The principal and MacDonald & Kahn Co., Ltd., a Delaware corporation, as surety, jointly and severally in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of MacDonald & [278] Kahn Co., Ltd., hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00);

The principal and J. F. Shea Co., Inc., a Delaware corporation, as surety, jointly and severally

in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of J. F. Shea Co., Inc., hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00);

The principal and Morrison-Knudsen Company, Inc., a Delaware corporation, as surety, jointly and severally in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of Morrison-Knudsen Company, Inc., hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00);

The principal and S. D. Bechtel, K. K. Bechtel and W. A. Bechtel, Jr., as sureties, jointly and severally in a sum equal to one-sixth of the total amount of this bond, but in no event shall the aggregate liability of S. D. Bechtel, K. K. Bechtel and W. A. Bechtel, Jr., hereunder exceed the amount of Sixty Thousand and no/100 Dollars (\$60,000.00).

The condition of the foregoing obligation is such that:

Whereas, on the 27th day of September, 1938, in the District Court of the United States of the Northern District of California, Southern Division, in a suit depending in that court wherein Six Companies of California was plaintiff and cross-defendant and Joint Highway District No. 13 of the State of California was defendant and cross-complainant and Six Companies of California and Hartford Accident and Indemnity Company, a Connecticut

corporation; Fidelity and Deposit Company of Maryland, a Maryland corporation; The Aetna Casualty and Surety Company, a Connecticut corporation; Indemnity Insurance [279] Company of North America, a Pennsylvania corporation; American Surety Company of New York, a New York corporation; Maryland Casualty Company, a Maryland corporation; United States Fidelity and Guaranty Company, a Maryland corporation; The Fidelity and Casualty Company of New York, a New York corporation; Glens Falls Indemnity Company, a New York corporation; Standard Surety and Casualty Company of New York, a New York corporation; Standard Accident Insurance Company, a Michigan corporation; Massachusetts Bonding and Insurance Company, a Massachusetts corporation; Continental Casualty Company, an Indiana corporation; and New Amsterdam Casualty Company, a New York corporation, were cross-defendants, numbered on the Civil Docket as 20101-R, a judgment was rendered in favor of said defendant and against said plaintiff on the complaint and in favor of said defendant and cross-complainant and against said plaintiff and cross-defendants on the cross-complaint, and the said plaintiff and cross-defendants having filed or being about to file in the office of the Clerk of said District Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City and County of San Francisco, State of California.

Now, the condition of the above obligation is such that if the said plaintiff and cross-defendants shall prosecute their appeals to effect and satisfy the said judgment in full, together with costs, interest and damages for delay if for any reason said appeals are dismissed, or if the judgments are affirmed, and satisfy in full such modification of the judgments and such costs, interest and damages as the Appellate.[280] Court may adjudge and award, then the above obligation is void else to remain in full force and effect.

In Witness Whereof, the undersigned have executed this bond this 7th day of November, 1938.

SIX COMPANIES OF
CALIFORNIA,
a Nevada corporation,

[Seal]

By HENRY J. KAISER,
President.

By GEORGE T. SLOAN, •
Assistant Secretary.
Principal.

HENRY J. KAISER
COMPANY,
a Nevada corporation,

[Seal]

By HENRY J. KAISER,
President.

By E. E. TREFETHEN, JR.,
Secretary,

**THE UTAH CONSTRUCTION
COMPANY,**

a Utah corporation,

[Seal] By L. S. COREY,
Vice-President.

By P. L. WATTIS,
Secretary,
MacDONALD & KAHN CO.,
LTD.,
a Delaware corporation,
President,

[Seal] By FELIX KAHN,
By E. G. SAHLIN,
Asst. Secretary.

J. F. SHEA CO., INC.,
a Delaware corporation,

[Seal] By CHARLES A. SHEA,
President.

By N. J. GOLDSMITH,
Assistant Secretary. [281]

MORRISON-KNUDSEN
COMPANY, INC.,
a Delaware corporation,

[Seal] By H. W. MORRISON,
Vice-President.

By C. W. JOSLYN,
Secretary.

S. D. BECHTEL,
K. K. BECHTEL,
W. A. BECHTEL, JR.,
Sureties.

Approved this 25th day of November, 1938.

MICHAEL J. ROCHE,
District Judge. [282]

State of California

County of Alameda—ss.

On this 7th day of November, 1938, before me Paul E. Rogers, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Henry J. Kaiser and George T. Sloan, known to me to be the President and Assistant Secretary, respectively, of Six Companies of California, the corporation that executed the within instrument and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the County of Alameda, State of California, on the day and year in this certificate first above written.

[Notarial Seal] PAUL E. ROGERS

Notary Public in and for the County of Alameda,
State of California.

(My commission expires Oct. 27, 1940.) [283]

State of California,

County of Alameda—ss.

On this 7th day of November, 1938, before me Paul E. Rogers, a Notary Public in and for the County of Alameda, State of California, residing therein, duly commissioned and sworn, personally appeared Henry J. Kaiser and E. E. Trefethen, Jr.,

known to me to be the President and Secretary, respectively, of Henry J. Kaiser Company, the corporation that executed the within instrument and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the County of Alameda, State of California, on the day and year in this certificate first above written.

[Notarial Seal] PAUL E. ROGERS,

Notary Public in and for the County of Alameda,
State of California.

(My commission expires Oct. 27, 1940) [284]

State of California,

City and County of San Francisco—ss.

On this 17th day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared L. S. Corey and P. L. Wattis, known to me to be the Vice-President and Secretary, respectively, of The Utah Construction Company, the corporation that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my

hand and affixed my official seal in my office in the City and County of San Francisco, State of California, on the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

(My commission expires December 8, 1938) [285]

State of California,
City and County of San Francisco—ss.

On this 10th day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Felix Kahn and E. G. Sahlin, known to me to be the President and Assistant Secretary, respectively, of MacDonald & Kahn Co., Ltd., the corporation that executed the within instrument and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

(My commission expires December 8, 1938) [286]

State of California,
City and County of San Francisco—ss.

On this 15th day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Charles A. Shea and N. J. Goldsmith, known to me to be the President and Assistant Secretary, respectively, of J. F. Shea Co., Inc., the corporation that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

(My commission expires: December 8, 1938)

[287]

State of Idaho,
County of Ada—ss.

On this 14th day of November, 1938, before me B. B. Bliss, Jr., a Notary Public in and for the County of Ada, State of Idaho, residing therein,

duly*commissioned and sworn, personally appeared H. W. Morrison and C. W. Joslyn, known to me to be the Vice-President and Secretary, respectively, of Morrison-Knudsen Company, Inc., the corporation that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of said corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in my office in the County of Ada, State of Idaho, on the day and year in this certificate first above written.

[Notarial Seal]

B. B. BLISS, JR.

Notary Public in and for the County of Ada, State of Idaho.

My commission expires: 3/19/41 [288]

State of California,

City and County of San Francisco—ss.

On this 21st day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared S. D. Bechtel, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at my office in

the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

(My commission expires December 8, 1938) [289]

State of California,
City and County of San Francisco—ss.

On this 16th day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared K. K. Bechtel, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

(My commission expires December 8, 1938.) [290]

State of California,
City and County of San Francisco—ss.

On this 16th day of November, 1938, before me Lulu P. Loveland, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared W. A. Bechtel, Jr., known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Notarial Seal] LULU P. LOVELAND

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires December 8, 1938. [291]

State of California,
County of Alameda—ss.

Eugene E. Trefethen, Jr., being first duly sworn, deposes and says:

That he is an officer, to-wit, the Secretary of Henry J. Kaiser Company, a corporation, one of the sureties which executed the foregoing undertaking and as such is authorized to, and does, make this affidavit for and on behalf of said corporation.

That said corporation is qualified to do business

in the State of California and in the Northern District thereof and is the owner of property therein and is worth the amount specified in said undertaking for which it is bound, over and above all its just debts and liabilities, exclusive of property exempt from execution.

E. E. TREFETHEN, JR.

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] PAUL E. ROGERS

Notary Public in and for the County of Alameda,
State of California.

My Commission expires Oct. 27, 1940. [292]

State of California,

City and County of San Francisco—ss.

P. L. Wattis, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Secretary of The Utah Construction Company, a corporation, one of the sureties which executed the foregoing undertaking and as such is authorized to, and does, make this affidavit for and on behalf of said corporation.

That said corporation is qualified to do business in the State of California and in the Northern District thereof and is the owner of property therein and is worth the amount specified in said undertaking for which it is bound, over and above all its just debts and liabilities, exclusive of property exempt from execution.

P. L. WATTIS

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires December 8, 1938. [293]

State of California,
City and County of San Francisco—ss.

Felix Kahn, being first duly sworn, deposes and says:

That he is an officer, to-wit, the President of Mac-Donald & Kahn Co., Ltd., a corporation, one of the sureties which executed the foregoing undertaking and as such is authorized to, and does, make this affidavit for and on behalf of said corporation.

That said corporation is qualified to do business in the State of California and in the Northern District thereof and is the owner of property therein and is worth the amount specified in said undertaking for which it is bound, over and above all its just debts and liabilities, exclusive of property exempt from execution.

FELIX KAHN

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Dec. 8th, 1938. [294]

State of California,
City and County of San Francisco.—ss.

Charles A. Shea, being first duly sworn, deposes and says:

That he is an officer, to-wit, the President of J. F. Shea Co., Inc., a corporation, one of the sureties which executed the foregoing undertaking and as such is authorized to, and does, make this affidavit for and on behalf of said corporation.

That said corporation is qualified to do business in the State of California and in the Northern District thereof and is the owner of property therein and is worth the amount specified in said undertaking for which it is bound, over and above all its just debts and liabilities, exclusive of property exempt from execution.

CHARLES A. SHEA

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires Dec. 8th, 1938. [295]

State of California,
City and County of San Francisco.—ss.

R. E. Evans, being first duly sworn, deposes and says:

That he is an officer, to-wit, the Assistant Secretary of Morrison-Knudsen Company, Inc., a cor-

poration, one of the sureties which executed the foregoing undertaking and as such is authorized to, and does, make this affidavit for and on behalf of said corporation.

That said corporation is qualified to do business in the State of California and in the Northern District thereof and is the owner of property therein and is worth the amount specified in said undertaking for which it is bound, over and above all its just debts and liabilities, exclusive of property exempt from execution.

R. E. EVANS

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires: December 8, 1938. [296]

State of California,

City and County of San Francisco.—ss.

S. D. Bechtel, one of the sureties named in and who executed the foregoing undertaking, being duly sworn, says that he is a resident and householder within the State of California and the Northern District thereof, and that he is worth the sum of Sixty Thousand and no/100 Dollars (\$60,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

S. D. BECHTEL

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires: December 8, 1938. [297]

State of California,
City and County of San Francisco.—ss.

K. K. Bechtel, one of the sureties named in and who executed the foregoing undertaking, being duly sworn, says that he is a resident and householder within the State of California and the Northern District thereof, and that he is worth the sum of Sixty Thousand and no/100 Dollars (\$60,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

K. K. BECHTEL

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires: December 8, 1938. [298]

State of California,
City and County of San Francisco.—ss.

W. A. Bechtel, Jr., one of the sureties named in and who executed the foregoing undertaking, being duly sworn says that he is a resident and householder within the State of California and the North-

ern District thereof, and that he is worth the sum of Sixty Thousand and no/100 Dollars (\$60,000.00) over and above all his just debts and liabilities, exclusive of property exempt from execution.

W. A. BECHTEL, JR.

Subscribed and sworn to before me this 23rd day of November, 1938.

[Notarial Seal] LULU P. LOVELAND,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires: December 8, 1938.

[Endorsed]: Filed Nov. 25, 1938. [299]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL. [300]

To the Appellee above-named and Messrs. Archibald B. Tinning and T. P. Wittschen, its Attorneys, and to the Clerk of the above-entitled Court:

You will please take notice that appellants above-named have filed notice of appeal to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled action on September 27, 1938, and pursuant to Rule 75 of the Federal Rules of Civil Procedure do designate for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action.

Dated: San Francisco, California, November 25,
1938.

**PAUL S. MARRIN
THELEN & MARRIN
DeLANCEY C. SMITH
EUGENE E. TREFETHEN**

1000 Balfour Building,
351 California Street,
San Francisco, California.

**JEWELL ALEXANDER
REDMAN, ALEXANDER & BACON**
315 Montgomery Street,
San Francisco, California.

Attorneys for Appellants.

Due service of the above hereby admitted this
25th day of November, 1938.

**ARCHIBALD B. TINNING
T. P. WITTSCHEN**

Attorneys for Appellees.

[Endorsed]: Filed Nov. 25, 1938. [301]

[Title of District Court and Cause.]

**STIPULATION CONCERNING PREPARA-
TION OF RECORD ON APPEAL. [302]**

Is Is Stipulated by and between the appellants
above-named and the appellee above-named, as fol-
lows:

1. That the copy of the Reporter's Transcript
now on file with the Clerk of the above-entitled court

may be delivered by him to the Clerk of the Circuit Court of Appeals for the Ninth Circuit for use in preparation of the record on appeal in that court in the above-entitled case.

2. That all of the original papers and exhibits included in the record or files of the above-entitled case may be sent to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for use in the appeal in the above-entitled cause.

3. That upon the conclusion of all proceedings on appeal it shall be obligatory upon the appellants to deliver to the Clerk of the above-entitled court a true copy of the Reporter's Transcript now on file with the Clerk of the above-entitled court.

4. That the above-entitled court may make its order without further notice to the parties hereto to carry out the terms and conditions of this stipulation.

Dated: San Francisco, California, November 22nd, 1938.

PAUL S. MARRIN
THELEN & MARRIN
DeLANCEY C. SMITH
EUGENE E. THEFETHEN

1000 Balfour Building
351 California Street

San Francisco, California.

Attorneys for Appellant
Six Companies of California. [303]

JEWELL ALEXANDER

REDMAN, ALEXANDER & BACON

315 Montgomery Street

San Francisco, California

Attorneys for Appellants other than
Six Companies of California.

ARCHIBALD B. TINNING

T. P. WITTSCHEN

924 Main Street

Martinez, California

Attorneys for Appellee.

[Endorsed]: Filed Dec. 20, 1938. [304]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO SEND CERTAIN DOCUMENTS AND EXHIBITS TO CIRCUIT COURT OF APPEALS [305]

Upon reading and filing the stipulation dated November 22nd, 1938, between the appellants and appellee above-named, and good cause appearing therefor, comes now the Court and

Orders and directs that the Clerk of the above-entitled court shall transmit and deliver to the Clerk of the Circuit Court of Appeals for the Ninth Circuit the following:

(a) Copy of the Reporter's Transcript now on file with said Clerk;

(b) All original papers and exhibits in the above-entitled case.

It is further ordered that upon the conclusion of all proceedings on appeal, appellant shall deliver to the Clerk of this court a true copy of the Reporter's Transcript of the proceedings at the trial of the above-entitled case.

Dated: San Francisco, California, December 20th, 1938.

MICHAEL J. ROCHE

Judge of the United States District Court

[Endorsed]: Filed Dec. 20, 1938. [306]

[Title of District Court and Cause.]

STIPULATION THAT COURT MAY EXTEND
TIME FOR FILING THE RECORD ON
APPEAL AND DOCKETING THE ACTION

It is hereby stipulated by and between the parties to the above entitled action that the District Court may make its order extending the time for filing the record on appeal and docketing the above entitled action with the United States Circuit Court of Appeals for the Ninth Circuit, [307] to and including February 21, 1939.

Dated: San Francisco, California, December 20,
1938.

PAUL S. MARRIN
THELEN & MARRIN
DeLANCEY & SMITH
EUGENE E. TREFETHEN

1000 Balfour Building
351 California Street,
San Francisco, California

JEWEL ALEXANDER
REDMAN, ALEXANDER & BACON

315 Montgomery Street
San Francisco, California

Attorneys for Appellants

ARCHIBALD B. TINNING
T. P. WITTSCHEN

924 Main Street
Martinez, California

Attorneys for Appellee

[Endorsed]: Filed Dec. 20, 1938. [308]

[Title of District Court and Cause.]

**ORDER EXTENDING THE TIME FOR FILING
THE RECORD ON APPEAL AND DOCK-
ETING THE ACTION**

Good cause appearing therefor, it is hereby ordered that the time for filing the record on appeal and docketing the above entitled action with the United States Circuit Court of Appeals for the

Ninth Circuit be, and the same is hereby, extended to and including February 21, 1939.

Dated: San Francisco, California, December 20th, 1938.

MICHAEL J. ROCHE

District Judge

[Endorsed]: Filed Dec. 20, 1938. Walter B. Maling, Clerk, By _____, Deputy Clerk.

[Endorsed]: Filed Dec. 22, 1938. Paul P. O'Brien, Clerk.

[Endorsed]: Re-filed Feb. 23, 1939. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

STIPULATION DESIGNATING THE PARTS
OF THE RECORD, PROCEEDINGS AND
EVIDENCE TO BE INCLUDED IN THE
RECORD ON APPEAL

It is hereby stipulated by and between the parties to the above entitled action that there shall be included in the record on the appeal by appellants to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the United States District Court in said action the following:

1. Complaint.
2. Answer and cross-complaint.
3. Answer of plaintiff and cross-defendants to cross-complaint. [338]

4. Answer of all cross-defendants other than plaintiff to cross-complaint.

5. Stipulation waiving trial by jury.

6. Amendment to complaint.

7. Amendment to plaintiff's answer to cross-complaint.

8. Amendment to cross-defendants' answer, other than plaintiff, to cross-complainant.

9. Reporter's transcript of evidence and proceedings at the trial.

10. All of the exhibits introduced by plaintiff in evidence at the trial, being exhibits Nos. 1 to 100, both inclusive.

11. All of the exhibits introduced by defendant in evidence at the trial, being exhibits lettered and numbered A to X-116, both inclusive.

12. Motion of defendant for judgment on the complaint and for special findings of fact and conclusions of law as same appears in the reporter's transcript of proceedings at the trial.

13. Motion of plaintiff for judgment on the complaint and for special findings of fact and conclusions of law as the same appears in the reporter's transcript of the proceedings at the trial.

14. Clerk's minute order of May 27, 1938, made in this case (Minute Book 51, p. 565).

15. Order granting motion for judgment on complaint in favor of defendant.

16. Clerk's minute order of May 31, 1938, made in this case (Minute Book 51, p. 568, et seq.).

17. Motion by cross-defendants to dismiss cross-complaint as same appears in the reporter's transcript of proceedings at the trial.

18. Order denying motion to dismiss cross-complaint.

19. Order granting motion to dismiss cross-complaint as to cross-defendants Fireman's Fund Indemnity Company and Pacific Indemnity Company.

20. Clerk's minute order of June 1, 1938, made in this case (Minute Book 51, p. 570).

21. Order granting motion to amend cross-complaint on face.

22. Dismissal of cross-complaint as to Fireman's Fund Indemnity Company and Pacific Indemnity Company. [339]

23. Motion of plaintiff for judgment and special findings of fact and conclusions of law on cross-complaint as same appears in the reporter's transcript of proceedings at the trial.

24. Motion of plaintiff for judgment and special findings of fact and conclusions of law on counter claims as same appears in the reporter's transcript of proceedings at the trial.

25. Motion of cross-defendants other than plaintiff for judgment and special findings of fact and conclusions of law on cross-complaint as same appears in the reporter's transcript of proceedings at the trial.

26. Motion of defendant for judgment and special findings of fact and conclusions of law on cross-

complaint as same appears in the reporter's transcript of proceedings at the trial.

27. Clerk's minute order of June 2, 1938, made in this case (Minute Book 51, p. 571, et. seq.).

28. Stipulation and order for amending answer and cross-complaint.

29. Clerk's minute order of August 8, 1938, made in this case (Minute Book 51, p. 655).

30. Opinion of the Judge of the District Court.

31. Defendant's requested findings of fact and conclusions of law.

32. Stipulation and order extending time of plaintiff and cross-defendants to submit findings of fact and conclusions of law and proposed amendments to defendant's requested findings of fact and conclusions of law.

33. Plaintiff's and cross-defendant's objections and amendments to defendant's requested findings of fact and conclusions of law and plaintiff's and cross-defendant's requested findings of fact and conclusions of law.

34. Findings of fact and conclusions of law. This is the same document described under 31 hereinabove.

35. Judgment.

36. Notice of entry of judgment prepared and served by the Clerk on September 27, 1938, and proof of service. [340]

37. Defendant and cross-complainant's notice of entry of judgment and proof of service, filed on or about September 30, 1938.

38. Notice of appeal dated November 25, 1938, and filed November 25, 1938.

39. Clerk's notice that notice of appeal was filed by plaintiff and cross-defendants on November 25, 1938, dated same date.

40. Supersedeas bond.

41. Appellant's designation of contents of record on appeal.

42. Stipulation that District Court may order all original papers and exhibits sent to the United States Circuit Court of Appeals for the Ninth Circuit.

43. Order of District Court that all original papers and exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

44. Stipulation that District Court may extend time for filing and docketing record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit to and including February 21, 1939.

45. Order of District Court extending time for filing and docketing record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit to and including February 21, 1939.

46. Stipulation for correction of errors in reporter's transcript and order of Court directing such correction of errors.

47. This stipulation as to contents of record on appeal.

48. Clerk's certificate.

It is hereby stipulated that the record on appeal prepared in accordance with this stipulation will be

a full and complete record of all of the proceedings and evidence in the above entitled action and that such record shall constitute full and complete compliance with the law and the rules of Civil Procedure of the District Courts of the United States, and the Clerk of this Court is hereby requested to prepare, certify and transmit to and file in the United States Circuit Court of Appeals for the Ninth [341] Circuit a transcript of record in this cause in accordance with this stipulation.

Dated: January 30, 1939.

PAUL S. MARRIN
THELEN & MARRIN
DeLANCEY C. SMITH
EUGENE E. TREFETHEN

1000 Balfour Building,
351 California Street,
San Francisco, California.

JEWEL ALEXANDER
REDMAN, ALEXANDER & BACON

315 Montgomery Street,
San Francisco, California.

Attorneys for Appellants.

ARCHIBALD B. TINNING
T. P. WITTSCHEN

924 Main Street,
Martinez, California.

Attorneys for Appellee.

[Endorsed]: Filed Feb. 2, 1939. [342]

[Title of District Court.]

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 342 pages, numbered from 1 to 342, inclusive, and Volume II, with pages numbered from 1 to 1879, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Six Companies of California, a corporation, et al., vs. Joint Highway District No. 13 of the State of California, a public corporation, No. 20101-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$47.75, and that the said amount has been paid to me by the Attorneys for the appellants herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of February A. D. 1939.

[Seal] WALTER B. MANNING,

Clerk.

B. E. O'HARA,

Deputy Clerk. [343]

In the United States Circuit Court of Appeals for
the Ninth Circuit

Civil Action,

File Number 9113

SIX COMPANIES OF CALIFORNIA,
a corporation, et al.,

Appellants,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE
STATE OF CALIFORNIA, a public corpora-
tion,

Appellee.

APPELLANTS' CONCISE STATEMENT OF
POINTS ON WHICH THEY INTEND TO
RELY ON APPEAL AND DESIGNATION
OF PARTS OF RECORD APPELLANTS
THINK NECESSARY FOR THE CONSID-
ERATION OF SUCH POINTS.

Pursuant to the provisions of paragraph 6 of
Rule 19 of the Rules of this court, appellants above
named file this as a concise statement of the points
on which they and each of them intend to rely on
this appeal, and designate the following mentioned
parts of the record which appellants think are neces-
sary for the consideration of such points.

1. The District Court erred in ruling that plain-
tiff was not entitled to rescind the contract be-
tween plaintiff and defendant upon the ground

that plaintiff was entitled to an extension of time within which to perform the contract, and the denial of such extension by defendant, and the deduction of a penalty of Five Hundred Dollars (\$500) per day commencing with the 25th day of May, 1936, deprived plaintiff of money which it was entitled to receive under the contract, and failure to pay same constituted a breach of said contract, giving plaintiff a right to rescind same.

2. The District Court erred in ruling that plaintiff was not entitled to an extension of time within which to complete the work under the contract for the reason that unavoidable delay was caused in the performance of the contract over which the plaintiff had no control. This unavoidable delay entitled plaintiff to an extension of time beyond the 720 days provided in the contract for performance of same for not less than 300 days additional within which to complete the work; and was caused by

(a) Slides in the excavation outside of the West Portal;

(b) Unstable ground conditions and other difficulties in excavating the West Portal section of the tunnels;

(c) Difficulty in placing concrete lining under instructions of the Engineer of defendant in the West Portal sections;

(d) Treacherous and unstable ground conditions requiring stoppage of excavation in August, 1935;

(e) Falling in of portion of excavated section of tunnel on August 28, 1935, and stoppage of work under orders of the Industrial Accident Commission of the State of California as a result of same;

(f) Falling in of portion of excavated section of tunnels on February 22, 1936, and orders of the Industrial Accident Commission of the State of California resulting therefrom which stopped work;

(g) Ground conditions encountered throughout progress of the excavation which required artificial support of same, and increased work over amount necessary to be done in the event ground had been self-supporting;

(h) Stormy and inclement weather.

3. The District Court erred in ruling that plaintiff was not entitled as a matter of right to an extension of time under the provisions of the contract for delays caused in the performance of the work by stormy or inclement weather.

4. The District Court erred in ruling that plaintiff was not entitled to an extension of time for unavoidable delays, as set forth above in paragraph 2 of these points, in performance of the contract which obligated the defendant to grant plaintiff an extension of time for same.

5. The District Court erred in refusing to rule that the action of the Board of Directors of defendant in refusing to extend the time of plaintiff

within which to perform the work under said contract between plaintiff and defendant was arbitrary, capricious, fraudulent and void and that notwithstanding said refusal plaintiff was entitled to an extension of time for the reasons set forth under point 2 hereof sufficient to enable it to complete all the work under said contract.

6. The District Court erred in refusing to rule that the action of the District Engineer of defendant in failing to certify to the Board of Directors of defendant that, in his judgment, there were reasons which had unavoidably delayed the work of plaintiff under said contract between plaintiff and defendant and in stating to said Board that there were no such reasons, and his said actions were known by the Board of Directors of defendant to be so arbitrary, capricious and grossly mistaken as to amount to fraud and amounted to a complete failure of said Engineer to carry out and perform his duties under said contract to exercise a fair and impartial judgment in said matter.

7. The District Court erred in ruling that plaintiff did not have the right to rescind the contract between plaintiff and defendant because of the misrepresentation by defendant to plaintiff, prior to the execution of the contract between plaintiff and defendant, of the ground conditions through which the tunnels to be constructed under said contract were to be driven and by which misrepresentations defendant represented to plaintiff that said ground

conditions would be much more favorable for the construction of said tunnels than they actually were. The District Court erred in ruling that said misrepresentations did not amount to fraud on the part of defendant which induced plaintiff to enter into said contract and in ruling that plaintiff did not have the right to rescind said contract because of said misrepresentations.

8. The District Court erred in ruling that said contract between plaintiff and defendant was not entered into under a mutual mistake of fact as to the condition of the ground through which the tunnels to be constructed under said contract were to be driven which was so material that plaintiff had the right to rescind said contract.

9. The District Court erred in ruling that plaintiff waived its right to rescind said contract because of the failure of defendant to make the progress payments provided therein to be made.

10. The District Court erred in ruling that plaintiff waived its right to rescind said contract because of the misrepresentations by defendant as to the ground conditions through which the tunnels provided in said contract to be constructed were to be driven.

11. The District Court erred in ruling that plaintiff waived its right to rescind said contract because the same was entered into under a mutual mistake of fact as to the ground conditions through which the tunnels to be constructed under said

contract were to be driven.

12. The District Court erred in ruling that, under said contract between plaintiff and defendant, plaintiff was not entitled as of right to an extension of time within which to complete the work under said contract.

13. The District Court erred in refusing to rule that defendant breached its said contract with plaintiff by failing to cause its engineer to set sufficient points to line and grade for plaintiff to work to in performing the work under said contract and in refusing to rule that because of said breach plaintiff was entitled to rescind said contract.

14. The District Court erred in ruling that plaintiff did not have a right to rescind the contract for the failure and refusal of defendant to make the progress payments to plaintiff under said contract when and as due and because defendant asserted and exercised the alleged right to deduct agreed or liquidated damages from such payments for the following reasons:

Defendant, by the geological report, contract, plans and specifications and by exhibiting to plaintiff test drifts and test pits, represented to plaintiff and warranted to plaintiff, that the ground through which the tunnels were to be constructed would, for the most part, be self-supporting, that only temporary removable timber, if any, would be required and that methods of construction could be employed suitable to self-supporting ground and

which would enable plaintiff to complete the work within 720 days after the execution of the contract.

Said representations were false and untrue. They misled plaintiff as to the methods and procedure which could be employed in performing the work of excavating the tunnels and resulted in serious delay to the work.

Defendant further delayed the work by ordering parts of it to be stopped or delayed and by the refusal of defendant and its Engineer to cooperate on a practical plan for proceeding with the work after the cave-in of August 28, 1935.

Defendant, by its own fault and through its own actions, having delayed the work, waived the provisions of the contract stipulating the time for completion thereof and all right to recover any agreed or liquidated damages for delay or to deduct the same from any progress payments due plaintiff and the deduction by defendant of any amounts from progress payments due plaintiff was wrongful and gave plaintiff the right to rescind the contract.

15. The District Court erred in striking out as evidence the geological report offered in evidence by plaintiff (Plaintiff's Exhibit 22). The defendant published notice inviting bids for the construction of its project, and invited and required the attention of prospective bidders to the specifications and plans on file with the District. These specifications in Section 32 under the heading of Tunnel Construction, by subsection 4 thereof, di-

rected attention of bidders to a geological report on the geological structures through which the tunnels would pass on file in the office of the District Engineer. Pursuant to this clause in the specifications, plaintiff examined this report and took a copy of same for use in connection with planning its bid on the work to be done in performance thereof if its bid was accepted. The undisputed testimony is that the plaintiff relied on the contents of this report in making its bid, and in forming its plans for the doing of the work, and in carrying out the work, until it was found that said report was erroneous.

The report was clearly admissible for the purpose of showing the proper reliance of plaintiff on the contents of same, and to establish that delay caused by the difference in the ground conditions met with from those predicted in the report was unavoidable to plaintiff and was competent, relevant and material evidence on the issues of fraud, mistake and the right of plaintiff to an extension of time.

16. The District Court erred in striking out as evidence the tracing made by the witness Calhoun of a profile map contained in Exhibit 22 offered by plaintiff and stricken out by the court (Plaintiff's Exhibit 23). This exhibit was offered by plaintiff through the witness Calhoun to show that when the witness examined the geological report at the office of the District Engineer he made a tracing, or exact copy, of a map contained in the report showing the

section of the work included in the tunnels, and that this tracing was later used by the plaintiff in connection with the geology report in making its bid and planning the doing of the work. It was admissible on the same ground as Exhibit 22 was admissible, and for the same reasons.

17. The District Court erred in granting the motion made by defendant to strike from the record exhibits 22 and 23 and certain evidence in connection therewith.

18. The District Court erred in the admission in evidence of defendant's Exhibit "F", which was a letter dated April 19, 1935, from C. H. Fry, Superintendent of Safety of the Industrial Accident Commission of the State of California to T. M. Price, Project Manager of the plaintiff, to which was attached a memorandum dated April 15, 1935, from F. L. Lowell to C. H. Fry. The letter purports to recite certain conversations said to have occurred before the plaintiff bid on the doing of the work involved in this case between C. H. Fry and Mr. Larson and Mr. Fontaine, and was not admissible because it was clearly hearsay and in no way binding upon the plaintiff, and because the parties to the alleged conversation mentioned in the letter were not called as witnesses to establish same.

19. The District Court erred in admitting as evidence defendant's Exhibit "WWW", being a letter dated March 4, 1936, from C. H. Sweetser, District Engineer of the United States Department

of Agriculture, to the District Engineer of defendant, with which letter was inclosed a memorandum dated February 4, 1936, from Thomas H. MacDonald, Chief of the Bureau of Public Roads of the United States Department of Agriculture to district engineers of the same department, which in turn transmitted and inclosed a copy of Administrative Order No. 54 (Supplement 1) of Federal Emergency Administration of Public Works, dated August 29, 1935, signed by Horatio B. Hackett, Assistant Administrator. The letter and the inclosures were clearly inadmissible. Same were offered through plaintiff's witness S. D. Bechtel on cross-examination and were inadmissible as not proper cross-examination, and as not binding on the plaintiff in any manner, and hearsay, and for other objections urged at the time.

20. The District Court erred in admitting into evidence as defendant's Exhibit "O-4" a copy of a grant agreement dated March 9, 1934, between defendant and the United States of America by which certain money was provided to be granted to the defendant district, but to which agreement the only parties were the defendant and the United States. This agreement was inadmissible because plaintiff was not a party to it, and had never seen it, and same was not binding on it, and it was incompetent, irrelevant, and immaterial, and was inadmissible for all the reasons given at the trial.

21. The District Court erred in the admission of

Exhibits "X-1 to X-116", inclusive, which were offered by the defendant as cross-complainant in support of the allegations of its cross-complaint. Each of same was inadmissible for the reason that the cross-complaint did not state a cause of action against the cross-defendants, and was prematurely filed, and all of the offered exhibits were inadmissible for these reasons.

22. The District Court erred in admitting in evidence, over the objection of plaintiff and cross-defendants, any evidence on the cross-complaint for the following reasons:

(1) The Court had no jurisdiction of the cross-complaint because at the time it was filed two of the cross-defendants were citizens of the same State as the cross-complainant.

(2) The cross-complaint does not state a cause of action because it is based on an alleged right to recover damages for abandonment of the work and such alleged right is based on, and governed by, the provisions of paragraph 5 of the contract and Section 6 (q) of the specifications and the cross-complaint shows on its face that the cross-complainant did not perform the conditions in said provisions of said contract which it was required to perform in order to maintain said action.

(3) The cross-complaint was prematurely filed and should have been dismissed on the motion of cross-defendants because it shows on its face that cross-complainant did not, prior to filing the same,

perform the conditions which it was required to perform under paragraph 5 of the contract and Section 6 (q) of the specifications prior to the commencement of any action based on an alleged abandonment by plaintiff of the work under the contract.

23. The District Court erred in admitting in evidence, over the objection of plaintiff and cross-defendants any evidence on the cross-complaint relating to agreed or liquidated damages for the further reason that the cross-complaint was based on an alleged cause of action for abandonment by plaintiff of the work and the contract properly construed, and particularly paragraph 5 thereof and Section 6 (q) of the specifications, defines and limits the damages in such case to the excess, if any, of the cost of completing the work over the contract price for completion thereof and does not provide for the payment, or recovery of any agreed or liquidated damages for delay.

24. The District Court erred in denying the motion of plaintiff and cross-defendants (Tr. pp. 1707 to 1709) to strike from the record the evidence referred to in said motion upon the grounds and for the reasons stated therein.

25. The District Court erred in making its findings of fact and conclusions of law in that it failed to find the facts specially and failed to discharge its duty to appropriately and specifically determine all of the issues of fact in the case, and the findings

of fact as drawn and signed by the court did not formulate and state the underlying facts in the case; further, the findings of fact as filed by the court were not made by the court, but were adopted by the court from findings prepared by counsel for the defendant; and the same are a partisan and unfair statement of conclusions, and not a finding of the underlying facts. Further, the court was obligated to make the findings itself and not through counsel.

26. The District Court erred in ruling that the plaintiff abandoned the contract between plaintiff and defendant, and the work to be done under the contract. This ruling is contained throughout the findings made by the court and contrary to the rulings requested of the court in the findings of fact requested by the plaintiff. It is erroneous in that the facts correctly found show that defendant improperly, and unjustly, and without legal right or authority deducted a penalty from money due plaintiff under the terms of the contract in a payment tendered to plaintiff by defendant on June 10, 1936, for work done during the month of May, 1936, by which tendered payment a penalty of \$500 per day for May 25th to May 31st, inclusive, was deducted from the amount admittedly otherwise due plaintiff under the contract; and this payment having been tendered under a certificate by the District Engineer of defendant, same amounted to an irrevocable declaration by defendant that it would

continue to deduct \$500 per day from the payments due plaintiff under the contract until the date when plaintiff actually completed the work, as defendant at the time well knew plaintiff would not actually complete the work until approximately the 3rd day of January, 1937, so that the deduction of \$500 per day would result in a total deduction from money due plaintiff under the contract of \$112,000. This constituted a breach of contract by the defendant, giving plaintiff the right to rescind the contract and stop work thereunder, and bring an action for the recovery of the reasonable value of the work done by plaintiff up to the time of such breach. The penalty was improperly deducted because plaintiff was entitled to an extension of time until a date well past the date when it was anticipated plaintiff would complete its work under the contract; and the ruling of the District Court was contrary to the facts and the law.

27. The District Court erred in ruling that the contract between plaintiff and defendant was executed on June 4, 1934, and the uncontradicted evidence shows that it was not executed by defendant until June 14, 1934.

28. The District Court erred in ruling that the contract provided that the work thereunder should be completed within 720 days after its execution. The contract provided that there should be added to the period of 720 days from the date of the execution of the contract by the Board of Directors of defendant the time during which the plaintiff was

delayed in the work by acts of God, or by stormy and inclement weather or by any reason which in the judgment of the District Engineer, unavoidably delayed the work. The work was unavoidably delayed for the times and on account of the causes set forth in point 2 hereinabove and under the terms of the contract such additional time was required to be added to said period of 720 days.

29. The District Court erred in ruling that defendant was ready, able, and willing to submit the right of the defendant to deduct \$3,500.00 penalty for the month of May, 1936, from the amount delivered plaintiff on June 10, 1936, for work done during that month to the District Engineer for determination after that date. This ruling is found in subparagraph (1) of finding of fact XIV and elsewhere in the findings made by the court, and is erroneous in that the District Engineer had already deducted the penalty, made his decision and certified the amount due plaintiff to defendant, and no longer had any power to act in connection with the matter, as the contract by its terms provided that no extension of time could be given to the plaintiff to perform same after the expiration of the time originally fixed in the contract for its completion, but such extension must be given prior to that date.

30. The District Court erred in ruling that plaintiff was requested by the District Engineer to specify reasons for its request, dated June 10, 1935, for extension of time to complete the contract.

This ruling is contrary to the uncontradicted evidence and is found in sub-paragraph 2 of finding of fact XIV, and is erroneous as there is no evidence whatever in the record to support it and because the overwhelming weight of the evidence is that the District Engineer advised plaintiff, prior to the 10th day of June, 1935, that it was entitled to an extension of time and the request for such extension made on that date was based upon such advice.

31. The District Court erred in ruling that plaintiff knew on May 14th, 1936, its request for extension of time, dated May 8, 1936, would be denied. This ruling is made in sub-paragraph 2 and 3 of finding of fact XIV and elsewhere in the findings made and adopted by the court, and is erroneous in that it is absolutely contrary to the uncontradicted evidence, which was that if defendant denied such request it would be without intention on the part of defendant to deduct any penalty from the amount of money due plaintiff under the contract.

32. The District Court erred in ruling that plaintiff did not comply with any request made by the District Engineer for itemization of its claims for unavoidable delays. This ruling was made in sub-paragraph 4 of finding of fact XIV and elsewhere in the findings made and adopted by the court. It was erroneous in that the uncontradicted evidence showed that plaintiff was requested by

the Engineer in January, 1936, and later in April, 1936, to refrain from presenting a detailed request for an extension of time, which request was followed upon the further representation and statement by the District Engineer that a sufficient time to enable the plaintiff to complete the work without a deduction of penalty from payments due it would be granted.

It is further erroneous in that the evidence is conclusive that plaintiff submitted to defendant in writing detailed statements of the causes which delayed the work and that these were discussed orally with the District Engineer many times and that he was thoroughly familiar with them. The evidence is also conclusive that at no time between the date of filing by plaintiff of a request for an extension of time and the denial thereof did defendant or the District Engineer request plaintiff to specify or itemize the reasons for the request.

It was further erroneous in that there is no evidence to support the finding that the defendant acted in good faith in denying an extension of time to plaintiff. On the other hand, the evidence shows conclusively that defendant denied such requested extension without a hearing, without any request to plaintiff to submit reasons for the requested extension, and with knowledge on the part of defendant and its Engineer that the work had been unavoidably delayed and the reasons therefor. Furthermore, the evidence is uncontradicted that plaintiff was

advised by defendant before the last application for an extension was made, and before it could possibly have been considered by the District Engineer, that it would be denied, if made.

33. The District Court erred in ruling that the contractor was not delayed in the work, and that any delays that occurred were because of the methods of work adpted by plaintiff. This ruling is contained in sub-paragraph 5 of finding of fact XIV and elsewhere in the findings made and adopted by the court, and is erroneous in that it is contrary to the overwhelming weight of the evidence.

34. The District Court erred in ruling that the defendant and its Engineer acted fairly and honestly in passing upon the question of whether the contractor had been delayed in the performance of same by act of God, by stormy or inclement weather, or by any reason which in the judgment of the District Engineer unavoidably delayed the work. This ruling was made in sub-paragraph 5 of finding of fact XIV and elsewhere in the findings made and adopted by the court, and was erroneous in that the overwhelming weight of the evidence showed that the District and its Engineer acted arbitrarily, capriciously, fraudulently, unfairly and contrary to the facts and express statements made by them in connection with the subject.

35. The District Court erred in ruling that the contract provided that plaintiff was obligated to perform the work covered by same within the time

and price fixed in the contract regardless of conditions which might be encountered; and that plaintiff knew the underground conditions which were encountered before the 1st of January, 1935. This ruling was made by the court in sub-paragraph 6 of finding of fact XIV, and elsewhere in the findings made and adopted by the court, and was erroneous in that same was absolutely contrary to the uncontradicted evidence presented at the trial; and is contrary to the predictions contained in the geological report and the contract, plans and specifications under which the work was bid upon and performed by plaintiff.

The statement in finding XIV, sub-paragraph (6), that the underground conditions were known to plaintiff prior to January 1, 1935, is not supported by any evidence in the record. The evidence is uncontradicted that on said date plaintiff had excavated only about 100 feet of tunnels, each of which was approximately 2900 feet long, and that the ground conditions in the unexcavated portions of the tunnels were absolutely unknown to plaintiff.

The statement that plaintiff, with full knowledge of ground conditions from almost the inception of the contract, continued with the work for more than one year without making any complaint that underground conditions were different from those anticipated is not supported by any evidence in the record. The uncontradicted evidence is that plaintiff did not acquire any true knowledge of ground con-

ditions except during the course of the excavation and that at the expiration of a year after the date of the contract only a few hundred feet had been excavated in each tunnel. The evidence is further uncontradicted that prior to the expiration of a year after the contract was made plaintiff complained of the difference in the ground conditions.

The statement in this finding that defendant at no time made any misrepresentations to plaintiff is contrary to the evidence, which is conclusive that, prior to the submission of the bid by plaintiff, defendant furnished plaintiff with a geological report which misstated the ground conditions through which the tunnels were to be driven. Furthermore, the provisions of the plans and specifications relating to the construction of the tunnels were deceptive and misleading.

36. The District Court erred in ruling that the defendant furnished to plaintiff all the engineering work provided to be furnished in the contract between the parties. This ruling is contained in sub-paragraph 7 of finding of fact XIV, and elsewhere in the findings made and adopted by the court, and is erroneous in that the contract provided and the evidence showed such provision intended defendant was required to furnish to plaintiff lines and grades to work to, and that this was not done by defendant.

37. The District Court erred in ruling that plaintiff did not request the District Engineer to

pass upon the questions or matters stated in the notice of rescission served by plaintiff upon defendant. This ruling was made in sub-paragraph 8 of finding of fact XIV, and elsewhere in the findings made and adopted by the court, and is erroneous in that the overwhelming weight of the evidence showed that plaintiff repeatedly requested the District Engineer to pass upon all of the matters involved, and as to many of same the Engineer stated he agreed with the demands and position of plaintiff in connection therewith, thereby waiving any requirement that plaintiff make further demand upon him regarding the same.

38. The District Court erred in ruling that plaintiff had waived any right it ever had to rescind the contract. This ruling is made in sub-paragraph 9 of finding of fact XIV, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is contrary to the overwhelming weight of the evidence, which shows that plaintiff promptly rescinded the contract after it was first notified progress payments due to it would not be made in accordance with the terms of the contract, but on the contrary, same would be reduced by \$500.00 per day, deducted for penalty for failure to complete the work under the contract prior to May 24, 1936.

39. The District Court erred in ruling that plaintiff was obligated to obtain the consent of the Engineer before doing any work which was done by it

and involved in its claims in this case, which was in excess of the amount or price for the work fixed in the contract. This ruling was made in finding of fact XV, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is contrary to the proper interpretation of the contract, which did not require any such authority from the District Engineer.

Furthermore, finding of fact XV is directly contrary to the evidence in the record which is uncontradicted that on many occasions plaintiff objected, both orally and in writing, that the work it was being required to perform was different from that represented by defendant to plaintiff and described in the contract.

40. The District Court erred in ruling that the contract between the parties was entered into on the 4th day of June, 1934. This ruling was made in finding of fact XVIII, made and adopted by the court, and is erroneous in that under the applicable law the contract was not entered into until the 14th day of June, 1934.

41. The District Court erred in ruling that plaintiff did not perform any other work for defendant than the work specified in the contract between the parties. This ruling was made in finding of fact XXI, and elsewhere in the findings made and adopted by the court, and is erroneous because the overwhelming weight of the evidence shows that plaintiff performed approximately twice as much work for defendant in the construction in the tun-

nels as the amount specified for same in the contract.

42. The District Court erred in ruling that plaintiff was not entitled to judgment against defendant. This ruling is contained in paragraph 1 of conclusions of law made and adopted by the court, and is erroneous for the reasons set forth in this statement of points relied on by appellants next preceding the statement of this point, and for each and all of said reasons; and for the further reason that the uncontradicted evidence in the case, and the overwhelming weight of the evidence required that the court rule that plaintiff was entitled to judgment against defendant in accordance with the prayer of the complaint because of the breach of said contract made by defendant as set forth in the foregoing statement of points.

43. The District Court erred in ruling that defendant was entitled to judgment against plaintiff on the complaint and the answer thereto, as such ruling was without evidentiary support and each and all findings of fact made by the court and which are hereinabove mentioned in this statement of points on which appellants will rely are without evidentiary support or are contrary to the overwhelming weight of the evidence.

44. The District Court erred in failing to dismiss the cross-complaint for the reason that same did not state a cause of action against any of the cross-defendants.

45. The District Court erred in giving judgment for any amount whatever in favor of defendant on its cross-complaint. This ruling is found in conclusions of law 2, 4 and 5 made and adopted by the court; and is erroneous in that the cross-complaint was prematurely filed as the contract between plaintiff and defendant did not permit the doing of the work except by the forces of the defendant itself in the event that the defendant was required for any reason to complete same; and because no notification had been given by defendant to any of the cross-defendants of the amount of its claim after it completed the work and before commencing action, or of any balance due for same.

46. The District Court erred in ruling that cross-defendants were obligated to pay defendant and cross-complainant under the terms of the contract any sum whatever per day as liquidated damages. This ruling was made in findings of fact XXXIII, XXXIV, XXXV and XXXVI, and elsewhere in the findings made and adopted by the court, and is erroneous in that there is no authority in fact or in law in this case for assessment of liquidated damages against the cross-defendants because same cannot be assessed in this case as they are contrary to the provisions of the contract which contains a specific method to determine any loss occasioned by defendant and cross-complainant in the event it did any portion of the work.

Finding of fact XXXV is not supported by the evidence which is uncontradicted that, if defendant

were entitled to recover at all, any damages suffered from delay in completing the work can be readily and easily ascertained.

47. The District Court erred in ruling that plaintiff did not rely upon the representations contained in geological report in forming its bid, and that defendant made no representations to plaintiff by means of any geological report in making its bid. This ruling was made in finding of fact XXXIX, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is unsupported by any evidence and is contrary to the uncontradicted testimony.

48. The District Court erred in ruling that defendant did not represent by the plans or the specifications or any geological report that the tunnels would be driven through self-supporting ground for any percent of their total length, or could be constructed with the use of temporary timber support for the excavation of same, and that defendant made no representations in this particular. This ruling was made in finding of fact XL, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is not supported by any evidence and is contrary to the uncontradicted testimony in the case.

49. The District Court erred in ruling that plaintiff performed any of the work under the contract in the construction of the tunnels without belief in any representations made by defendant

except those in the notice to bidders, contract, plans and specifications. This ruling was made in finding of fact XLI, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is without any support in the evidence and is contrary to the uncontradicted testimony in the case.

50. The District Court erred in ruling that all expenditures by plaintiff in performance of the work were pursuant to and required under the contract, and that plaintiff spent nothing by reason of false representations by defendant. This ruling was made in finding of fact XLII, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is contrary to the evidence in the case, and is without support in the evidence, which affirmatively shows that plaintiff expended twice as much money as would have been required to have been expended if the conditions had been as represented by the defendant.

51. The District Court erred in finding that plaintiff was not required to do work different from that and in excess of that required under the contract in constructing the tunnels by reason of misrepresentations of underground conditions by the defendant. This ruling was made in findings of fact XLIV and XLV, and elsewhere in the findings made and adopted by the court, and was erroneous in that same is contrary to the evidence in the case, and the uncontradicted testimony to the effect

that plaintiff performed approximately twice as much work as would have been required if the tunnels had been through ground of the character represented and predicted in the contract, plans and specifications, and geological report.

52. The District Court erred in ruling that plaintiff was not called upon to do radically different work from that required under the contract under the conditions as represented to plaintiff by defendant. This ruling was made by the court in finding of fact XLVIII, and elsewhere in the findings and is erroneous in that same is contrary to the evidence, and without evidentiary support.

53. The District Court erred in making finding of fact XLIX because same is contrary to the evidence in the case, which evidence is uncontradicted and establishes that plaintiff was unavoidably delayed in the performance of the work, as hereinabove stated in this statement of points, and that none of said delays were caused by the acts of the plaintiff, and that the District Engineer and the defendant knew of the causes of the delay to plaintiff, but nevertheless said District Engineer and defendant fraudulently and capriciously and arbitrarily, and contrary to the contract provisions and the law, denied plaintiff any extension of time, although repeatedly requested to grant same, and although said District Engineer repeatedly promised he would recommend the grant of same.

54. The District Court erred in ruling that plaintiff was not mistaken as to the true condition

of the ground through which the tunnels were driven. This ruling was made in finding of fact L, and elsewhere in the findings made and adopted by the court, and is erroneous in that same is without evidentiary support and is contrary to the uncontradicted evidence in the case.

55. The District Court erred in rendering any judgment whatever on the cross-complaint against the cross-defendants based upon any delay in completion of the work. This ruling is found in paragraph 2 of conclusions of law made and adopted by the court, which are based upon findings of fact XXXIII, XXXIV, XXXV and XXXVI, made and adopted by the court, and is erroneous in that there was no proof whatever that cross-complainant sustained any damage by any delay in completion of the work.

56. The District Court erred in denying the request or motion of plaintiff and all the cross-defendants to make the amendments and alterations proposed by plaintiff and cross-defendants to defendant's proposed findings of fact and conclusions of law.

57. The District Court erred in denying the motion of plaintiff and all the cross-defendants to make the findings of fact and conclusions of law requested by plaintiff and cross-defendants. Said findings of fact which plaintiff and cross-defendants requested the Court to make are all supported by the uncontradicted evidence and were a correct, complete and accurate statement of the ultimate

facts proved by the uncontradicted evidence in the record and were and are material and necessary to a correct decision on the issues in the case.

The findings made by the court, in addition to being erroneous for the reasons hereinbefore stated in these points and being, in the main, mere conclusions, do not contain any finding at all on many of the ultimate facts necessary to a correct decision of the issues and are inadequate, incomplete and insufficient to comply with law and the rules governing the making of findings of fact.

The conclusions of law requested by plaintiff and cross-defendants are correct statements of the proper legal conclusions which the court should have made on proper and correct findings of the ultimate facts proved by the uncontradicted evidence in the record.

58. The District Court erred in denying the motion of the cross-defendants to dismiss the cross-complaint. Said cross-complaint did not state a cause of action against any of the cross-defendants because the cross-complaint is based on the claim that plaintiff abandoned the work under the contract and, under the terms of the contract and particularly under the provisions of paragraph numbered 5 thereof, on page 4, and the provisions of Section 6 (q) of the specifications, defendant was required, in case of abandonment of the work under the contract, to complete it with its own forces prior to any liability arising on the part of plaintiff or the other cross-defendants to pay the excess, if

any, of the cost of completing the work over the price stipulated in the contract between plaintiff and defendant for doing the uncompleted work. The undisputed evidence shows that defendant never completed the work with its own forces and that the event never occurred which gave rise to a cause of action in favor of defendant and against the cross-defendants, or any of them.

59. The District Court erred in denying the motion of cross-defendants to dismiss the cross-complaint on the ground that the Court did not have jurisdiction of the parties thereto. The pleadings show, and it is undisputed, that when the cross-complaint was filed defendant and cross-complainant was a resident and citizen of California and that two of the cross-defendants, namely, Fireman's Fund Indemnity Company and Pacific Indemnity Company, were residents and citizens of California. The Court, therefore, had no jurisdiction to entertain the cross-complaint and as jurisdiction did not exist when the cross-complaint was filed, it was not acquired by dismissing these two defendants during the course of the trial and in dismissing those two cross-defendants the District Court erred.

60. The District Court erred in denying the motion of cross-defendants to dismiss the cross-complaint on the ground that it was prematurely filed for the following reasons:

(1) The cross-complaint was based on the alleged right of cross-complainant to recover the excess cost of completing the work over the price

therefor stated in the contract between plaintiff and defendant because of an alleged abandonment of the work by plaintiff. The right of cross-complainant to recover in such case is based on the provisions of paragraph numbered 5 of the contract, on page 4, and the provisions of Section 6 (q) of the specifications and is limited thereby.

Under said provisions no right to recover any excess in cost arose until cross-defendant both completed the work and notified cross-defendants of such excess cost. The undisputed evidence shows that cross-complainant had not completed the work when it filed the cross-complaint and there is no evidence whatever that it ever notified any of the cross-defendants that the cost to cross-complainant of completing the work exceeded the contract price for completing it or that there was any such excess cost or that there was any demand for payment thereof.

(2) At the time the cross-complaint was filed the District Engineer had made no final estimate of the sum which would have been payable under the contract between plaintiff and defendant as required by Section 6 (q) of the specifications.

61. The District Court erred in including in the judgment on the cross-complaint any amount for liquidated damages, for the following reasons:

(1) The cross-complaint is based on the theory that plaintiff abandoned the contract. Section 4 (d) of the contract is not applicable as the measure of damages on such a cause of action. The contract

contains specific provisions for measuring and limiting the damages for abandonment. Those provisions are paragraph numbered 5 of the contract and Section 6 (q) of the specifications. Under those provisions the amount which cross-complainant is entitled to recover in case of abandonment is the excess of the cost of completing the work over the contract price and no more.

(2) Aside from the foregoing provisions of the contract specifically stating the measure of damages in case of abandonment the rule of law is well settled that provisions for liquidated damages for delay in performance such as those contained in Section 4 (d) of the contract do not constitute the measure of damages for delay in case of abandonment but that in such cases, no damages can be recovered for delay except such actual damages as are proved. Cross-complainant did not prove any actual damages from delay.

(3) Provisions in contracts stipulating liquidated or agreed damages for delay are void unless it would be impracticable or extremely difficult to fix the actual damages. Section 4 (d) of this contract is void because, if cross-complainant here suffered any actual damage from delay the amount thereof could have been easily fixed.

(4) The stipulated amount of damages in Section 4 (d) of the contract was so grossly disproportionate to any actual damages suffered by cross-complainant from delay that it constituted a penalty and said Section 4 (d) is void for that reason.

62. The District Court erred in denying the motions of plaintiff and cross-defendants for judgment on the complaint, cross-complaint and counter-claim of defendant.

63. The District Court erred in granting the motions of defendant for judgment on the complaint and cross-complaint.

64. Plaintiff and cross-defendants duly excepted to all of the rulings of the District Court hereinbefore mentioned and stated to have been erroneously made and appellants, in addition to all other points hereinbefore stated, will rely on appeal on each of such exceptions so made.

Appellants hereby designate as the parts of the record which they think are necessary for the consideration of such points, the following:

(1) All of the evidence and proceedings which the parties have stipulated and agreed, in a stipulation, dated February 21, 1939, and filed with the above entitled court, shall be printed or reproduced in the printed record.

(2) The agreed statements of fact included in, and attached to, said stipulation.

(3) All the exhibits which the parties hereto have, in said stipulation, stipulated and agreed need not be included in the printed record, because by their nature or character it is impossible or impracticable to include the same therein, but which have been sent to the above entitled court by the District Court for its inspection and use on the ap-

peal, and which the parties have stipulated and agreed in said stipulation may be so used.

Dated: February 21, 1939.

PAUL S. MARRIN,
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Attorneys for Appellants.

Receipt of a copy of the foregoing appellants' concise statement of points on which they intend to rely on appeal and designation of parts of record appellants think necessary for the consideration of such points is hereby acknowledged this 21st day of February, 1939.

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,
924 Main Street,
Martinez, California.

Attorneys for Appellee.

[Endorsed]: Filed February 21, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION DESIGNATING PARTS OF
THE RECORD TO BE PRINTED.**

It is hereby stipulated by and between the parties to the above entitled action that those parts of the record on appeal hereinafter designated be printed, or in case of photographs and drawings, reproduced and included in the printed record, and the Clerk of the above entitled court is requested to cause to be printed and reproduced in the printed record those parts of the record which the parties hereby designate as follows:

1. Complaint. R. P. 1.
2. Answer and cross-complaint. R. P. 5.
3. Answer of plaintiff and cross-defendant Six Companies of California to cross-complaint. R. P. 54. (Note: Exhibit A to the cross-complaint is a copy of Exhibit No. 18 which it is hereinafter stipulated shall be printed and for that reason said Exhibit A need not be printed.)
4. Answer of all cross-defendants other than plaintiff to cross-complaint. R. P. 76.
5. Stipulation waiving trial by jury. R. P. 98.
6. Amendment to complaint. R. P. 100.
7. Amendment to plaintiff's answer to cross-complaint. R. P. 104.
8. Amendment to cross-defendants', other than plaintiff, answer to cross-complaint. R. P. 108.
9. The following parts of the reporter's transcript of evidence and proceedings at the trial: Volume 2.

- (1) Omit all of pages 1 to 100, both inclusive.
- (2) Include all of the proceedings and evidence reported on pages 101 to 1543, line 18, both inclusive.
- (3) Omit commencing with the words, "Now, if your Honor please," line 19, page 1543, to page 1556, lines 1 and 2, inclusive.
- (4) Insert following line 18, page 1543, the following agreed statement:
"Here follows the argument of Mr. Alexander in support of his motion which has been omitted by stipulation."
- (5) Include all of the proceedings and evidence reported on page 1556, commencing with line 3, the words "Mr. Smith," all the remainder of that page and all of page 1557.
- (6) Omit page 1558, line 1, to page 1562, line 3, both inclusive.
- (7) Include page 1562, beginning with line 4, and the words "Mr. Smith," to page 1568, line 25, both inclusive.
- (8) Insert following line 25, page 1568, the following agreed statement:
"Here follows the argument of Mr. Smith in support of his motion and the argument of Mr. Wittschen for defendant and cross-complainant in reply to the arguments of Mr. Alexander and

Mr. Smith, which arguments have been omitted by stipulation."

- (9) Omit page 1568, beginning with the words "Now, in supplementing" in line 26, to page 1617, line 5, both inclusive.
- (10) Include commencing line 6, page 1617, with the words "The Court," all the balance of that page and all of pages 1618 and 1619.
- (11) Include all of pages 1620 to 1729, line 2.
- (12) Omit the balance of page 1729 commencing with the words "The Court," in line 3, to the end of line 10, page 1827, both inclusive.
- (13) Insert following line 2, page 1729, the following agreed statement:
"Here follows the arguments of Mr. Wittschen for defendant and cross-complainant, the argument of Mr. Marrin for plaintiff, and the argument of Mr. Alexander for the cross-defendant surety companies, which arguments have been omitted by stipulation."
- (14) Insert the following agreed statement and parts of the reporter's transcript:
"During the course of Mr. Alexander's argument the following statements were made by the Court and respective counsel."

Insert beginning with the word "Why" page 1827, line 11, to the end of line 20, page 1837, both inclusive.

- (15) Omit page 1837, commencing with the word "Continuing" in line 21, to the end of line 19, page 1876, both inclusive.

- (16) Insert following line 20, page 1837, the following agreed statement:

"The remainder of Mr. Alexander's argument and Mr. Wittschen's argument in reply have been omitted by stipulation."

- (17) Insert the following agreed statement and parts of the reporter's transcript:

"At the conclusion of Mr. Wittschen's argument (which has been omitted by stipulation) the following took place:

Then insert the reporter's transcript, commencing with the words "The Court" in line 20, page 1876, all the balance of that page and all of pages 1877, 1878 and 1879.

10. The following exhibits introduced in evidence by plaintiff:

- (1) It is stipulated that an agreed statement of facts in the form hereto attached and marked Exhibit "A" shall be printed in the record in lieu of plaintiff's exhibits numbers 1, 5, 6, 8, 9, 11, 12, 13, 14, 15, 17, 19, 20 and 21.

(2) Those parts of Exhibit No. 3, (R. P.) being the specifications for the construction of the project of defendant, designated as follows:

- (a) All of page 1, except that part of subparagraph (d) of Section 2, appearing thereon.
- (b) Subparagraph (i) of Section 2, appearing on page 2.
- (c) The title and all of Section 3, appearing on pages 2 and 3.
- (d) The title and all of Section 4, appearing on page 3.
- (e) All of Section 5 of Exhibit No. 10, which is an amendment to the specifications, commencing with the title "Section 5—Payments" and all the balance thereof shall be printed at this place in lieu of Section 5 of the original specifications which it superseded. R. P.
- (f) The title and all of Section 6, appearing on pages 4 to 10, inclusive, and Section (z-6) of Exhibit No. 10.
- (g) The title and all of Section 7, appearing on page 10.
- (h) The title and all of Section 8, appearing on pages 11 to 13, inclusive.
- (i) The title and all of Section 9, appearing on pages 13 and 14.

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- (j) The title and all of Section 10, appearing on pages 14 and 15.
 - (k) The title and all of Section 13, appearing on pages 17 to 21, inclusive.
 - (l) The title and all of Section 14, appearing on pages 21 and 22.
 - (m) The title and all of Section 15, appearing on pages 22 to 29, inclusive.
 - (n) The title and all of Section 17, appearing on pages 32 to 36, inclusive.
 - (o) The title and all of Section 32, appearing on pages 57 to 63, inclusive.
 - (p) The title and paragraphs 1, 2 and 3 of Section 33, appearing on pages 63 and 64.
-
- (3) Exhibit No. 7, being an amendment to the specifications, dated January 9, 1934. R. P.
 - (4) Exhibit No. 4, engineer's estimate. R. P.
 - (5) Exhibit No. 16, the contract. R. P.
 - (6) Exhibit No. 18, bond for faithful performance. R. P.
 - (7) All of Exhibit No. 22, being the geological report. R. P.
 - (8) Exhibit No. 23, tracing of profile map. R. P.
 - (9) Exhibit No. 24, engineer's estimate of cost. R. P.
 - (10) Exhibit No. 25, drawing of location of drift. R. P.

- (11) Exhibit No. 27, drawing of contemplated methods of construction of tunnels. R. P.
- (12) Exhibit No. 34, sketch of proposed drilling and timbering jumbo. R. P.
- (13) Exhibit No. 37, photograph of steel tunnel form and carrier. R. P.
- (14) Exhibit No. 39, series of photographs showing conditions during excavation of west portal cut. R. P.
- (15) Exhibit No. 40, photograph of footings for west portal buildings. R. P.
- (16) Exhibit No. 41, drawing showing bracing at west portal. R. P.
- (17) Exhibit No. 42, poster showing methods of excavation used. R. P.
- (18) Exhibit No. 43, photograph inside tunnel May 1, 1935. R. P. to .
- (19) Exhibits Nos. 45 to 57, both inclusive, all being letters. R. P.
- (20) Exhibit No. 59, tabulation of north tunnel excavation progress. R. P.
- (21) Exhibit No. 60, tabulation of south tunnel excavation progress. R. P.
- (22) Exhibits Nos. 62 to 67, both inclusive, all being letters. Two drawings are attached to Exhibit No. 62 showing proposed concreting methods. R. P.
- (23) Exhibit No. 68, series of six photographs of 1935 cave-in. R. P.
- (24) Exhibits Nos. 69 to 72, inclusive, all being letters. R. P.

- (25) Exhibit No. 73, summary of work completed by Six Companies of California. R. P.
- (26) Exhibit No. 76, photograph. R. P.
- (27) Exhibit No. 77, series of six photographs. R. P.
- (28) Exhibit No. 78, photograph. R. P.
- (29) Exhibit No. 81, drawing of typical square set. R. P.
- (30) Exhibit No. 82, series of four photographs of square sets. R. P.
- (31) Exhibit No. 83, drawing showing places in tunnels where square sets were placed. R. P.
- (32) Exhibit No. 84, letter. R. P.
- (33) Exhibit No. 85, series of three photographs. R. P.
- (34) Exhibit No. 86, schematic photograph. R. P.
- (35) Exhibit No. 87, series of four photographs of cave-in of February, 1936. R. P.
- (36) Exhibit No. 88, order of Industrial Accident Commission. R. P.
- (37) Exhibit No. 89, letter from Industrial Accident Commission. R. P.
- (38) Exhibit No. 90, order of Industrial Accident Commission. R. P.
- (39) Exhibit No. 91, order of Industrial Accident Commission. R. P.

- (40) Exhibit No. 92, order of Industrial Accident Commission, with diagram attached. R. P.
- (41) Exhibit No. 93, two photographs. R. P.
- (42) Exhibit No. 94, revised construction schedule. R. P.
- (43) Exhibit No. 95, letter. R. P.

11. Those exhibits introduced by plaintiff and which are not herein designated to be printed or reproduced in the printed record are omitted either because they are models, large drawings, charts, photographs and bulky tabulations which have, by order of the District Court, been sent to the United States Circuit Court of Appeals for the Ninth Circuit for its inspection and use upon this appeal and which it would be impossible or impracticable to reproduce in the printed record but which, subject to objections, if, any, made when introduced, it is stipulated may be considered by said Court of Appeals in deciding this appeal, or are exhibits which have been superseded by the agreed statement of facts attached hereto and marked Exhibit "A".

12. The following exhibits introduced in evidence by the defendant.

- (1) Exhibit A, being page 22 from the application of defendant to the Public Works Administration. R. P.
- (2) Exhibit B, being diagram map showing location of tunnels in vicinity of San Francisco Bay area. R. P.

- (3) Exhibit C, being twelve photographs. R. P.
- (4) Exhibit D, being the geological report of Hulin on the Claremont Tunnel. R. P.
- (5) Exhibit E, being a letter from L. M. Larson to George D. Louderback. R. P.
- (6) Exhibit F, being two letters. R. P.
- (7) Exhibit G, a photograph. R. P.
- (8) Exhibit H, a photograph. R. P.
- (9) Exhibit I, a photograph. R. P.
- (10) Exhibit L, a photograph. R. P.
- (11) Exhibit M, a photograph. R. P.
- (12) Exhibit N, letter and construction schedule. R. P.
- (13) Exhibit O, letter and construction schedule. R. P.
- (14) Exhibit P, perspective drawing of region of San Francisco Bay. R. P.
- (15) Exhibit S, letter with statement of sequence of operations for first 100 feet and drawings. R. P.
- (16) Exhibits T, U, V, W and X, all being letters. R. P. to
- (17) Exhibit Y, being an order of the Department of Industrial Relations of the State of California. R. P.
- (18) Exhibits Z and AA, both being letters. R. P. to
- (19) Exhibit BB, letter and drawings. R. P.
- (20) Exhibits CC to HH, both inclusive, all being letters. R. P. to

- (21) Exhibit II, letter with drawing attached. R. P.
- (22) Exhibits JJ to ZZ, both inclusive, all being letters. R. P. to
- (23) Exhibit AAA, being a letter. R. P.
- (24) Exhibit BBB, letter with drawing attached. R. P.
- (25) Exhibits CCC and DDD, both being letters. R. P. to
- (26) Exhibit EEE, special safety order of Industrial Accident Commission. R. P.
- (27) Exhibits FFF to JJJ, both inclusive, all being letters. R. P. to
- (28) Exhibit KKK, a letter with drawing attached. R. P.
- (29) Exhibits LLL to TTT, both inclusive, all being letters. R. P. to
- (30) Exhibit UUU, being transcript of proceedings of a hearing before the Industrial Accident Commission held on September 24, 1935. R. P.
- (31) Exhibit VVV, being a special safety order of the Industrial Accident Commission. R. P.
- (32) Exhibit WWW, consisting of a letter, memorandum and copy of administrative order of the Federal Emergency Administration of Public Works. R. P.
- (33) Exhibit XXX, being estimates numbers 1 to 23, inclusive. R. P.

- (34) Exhibit YYY, being a letter and a copy of estimate No. 24 and check. R. P.
- (35) Exhibit ZZZ, being a letter. R. P.
- (36) Exhibits A-4 to C-4, both inclusive, all being letters. R. P.to.....
- (37) Exhibit D-4, being a letter and a copy of estimate No. 25 and check. R. P.
- (38) Exhibit E-4, being a letter. R. P.
- (39) Exhibit G-4, being two photographs. R. P.
- (40) Exhibit H-4, being a photograph. R. P.
- (41) Exhibit I-4, being a letter. R. P.
- (42) Exhibits M-4-1 and M-4-2, being photographs. R. P. to
- (43) Exhibit N-4, being a photograph. R. P.
- (44) Exhibit O-4, being a contract between defendant and the United States of America. R. P.
- (45) Exhibit X-3, being a supplement to the specifications, dated August 17, 1936. R. P.
- (46) Exhibit X-11, being a supplement to the specifications, dated September 23, 1936. R. P.
- (47) Exhibits X-103 to X-108, both inclusive. R. P. to
- (48) It is stipulated that an agreed statement of facts in the form hereto attached and marked Exhibit "B" shall be printed in the record in lieu of defendant's exhibits

X-1, X-2, X-4 to X-10, both inclusive, and X-12 to X-102, both inclusive.

- (49) Exhibit X-109, being a schedule of total amounts paid by defendant for completing project under contracts for schedules A, B, C, D, E, F, G and H. R. P.
- (50) Exhibit X-110, being schedule showing amounts withheld from plaintiff and not appearing in any engineer's estimate. R. P.
- (51) Exhibit X-111, being schedule showing computed total cost of construction of defendant's project based on unit prices set forth in contract dated June 4, 1934, between plaintiff and defendant and units of work performed. R. P.
- (52) Exhibit X-112, being a schedule of computation of amount claimed by defendant from plaintiff for completion of the project. R. P.
- (53) Exhibit X-113, being a tabulation by defendant of costs alleged to be attributable to cessation of work by plaintiff. R. P.
- (54) Exhibit X-114, being a tabulation by defendant of costs of operations of defendant. R. P.
- (55) Exhibit X-115, being a computation by defendant of interest calculations. R. P.
- (56) Exhibit X-116, being affidavit and certificate of district engineer, dated November

29, 1937, respecting completion of defendant's project, filed with the Director of Public Works of the State of California on November 30, 1937, resolution of the Board of Directors of defendant, dated December 1, 1937, and certificate of County Clerk of Contra Costa County to filing of resolution with Board of Supervisors of Contra Costa County and certificate of County Clerk of Alameda County to filing of resolution with Board of Supervisors of Alameda County. R. P.

13. Clerk's minute order of May 27, 1938. R. P. 112.

14. Order granting motion for judgment on complaint in favor of defendant. R. P.

15. Clerk's minute order of May 31, 1938. R. P. 113.

16. Order denying motion to dismiss cross-complaint. R. P.

17. Order granting motion to dismiss cross-complaint as to cross-defendants Fireman's Fund Indemnity Company and Pacific Indemnity Company. R. P.

18. Clerk's minute order of June 1, 1938. R. P. 114.

19. Order granting motion to amend cross-complaint on face. R. P.

20. Dismissal of cross-complaint as to Fireman's Fund Indemnity Company and Pacific Indemnity Company. R. P. 115.

21. Clerk's minute order of June 2, 1938. R. P. 117.

22. Stipulation and order for amending answer and cross-complaint. R. P. 118.

23. Clerk's minute order of August 8, 1938. R. P. 131.

24. Opinion of the Judge of the District Court. R. P. 121.

25. Findings of fact and conclusions of law, being the same as those requested by defendant. R. P. 132.

26. Stipulation and order extending time of plaintiff and cross-defendants to submit findings of fact and conclusions of law and proposed amendments to defendant's requested findings of fact and conclusions of law. R. P. 188.

27. Plaintiff's and cross-defendants' objections and amendments to defendant's requested findings of fact and conclusions of law and plaintiff's and cross-defendants' requested findings of fact and conclusions of law. R. P. 193.

28. Judgment. R. P. 261.

29. Notice of entry of judgment prepared and served by the Clerk on September 27, 1938, and proof of service. R. P. 267.

30. Defendant and cross-complainant's notice of entry of judgment and proof of service, filed on September 30, 1938. R. P. 268.

31. Notice of appeal dated November 25, 1938, and filed November 25, 1938. R. P. 273.

32. Clerk's notice that notice of appeal was filed by plaintiff and cross-defendants on November 25, 1938. R. P. 276.

33. Supersedeas bond. R. P. 277.

34. Appellants' designation of contents of record on appeal. R. P. 300.

35. Stipulation that District Court may order all original papers and exhibits sent to the United States Circuit Court of Appeals for the Ninth Circuit. R. P. 302.

36. Order of District Court that all original papers and exhibits be sent to the United States Circuit Court of Appeals for the Ninth Circuit. R. P. 305.

37. Stipulation that District Court may extend time for filing and docketing record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit to and including February 21, 1939. R. P. 307.

38. Order of District Court extending time for filing and docketing record on appeal with the United States Circuit Court of Appeals for the Ninth Circuit to and including February 21, 1939. On file with the Clerk of the Circuit Court of Appeals.

39. Stipulation as to contents of record on appeal. R. P. 338.

40. District Clerk's certificate to record on appeal. R. P. 343.

41. Those exhibits introduced by defendant and which are not herein designated to be printed or

reproduced in the printed record are omitted either because they are drawings, charts, photographs, catalogs and bulky tabulations which have, by order of the District Court, been sent to the United States Circuit Court of Appeals for the Ninth Circuit for its inspection and use upon this appeal and which it would be impossible or impracticable to reproduce in the printed record but which, subject to objections, if any, made when introduced, it is stipulated may be considered by said Court of Appeals in deciding this appeal, or are exhibits which have been superseded by the agreed statement of facts attached hereto and marked Exhibit "B".

This stipulation is made pursuant to subparagraph 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit and it is stipulated by all the parties hereto that the parts of the record which it is hereby stipulated shall be printed will contain all parts thereof which are necessary or material to a consideration of the points upon which appellants will rely on this appeal, except certain exhibits hereinbefore mentioned, consisting of models, large drawings, charts, photographs, catalogs and bulky tabulations which it is impossible or impracticable to print or reproduce in the printed record; provided, however, that should anything material to either party be omitted from the printed record by error or accident or should anything be misstated therein, the parties hereto stipulate and agree that such omission or

misstatement shall be corrected and, if necessary, that a supplemental record shall be printed.

Dated: February 21, 1939.

PAUL S. MARRIN,
THELEN & MARRIN,
DeLANCEY C. SMITH,
EUGENE E. TREFETHEN,
1000 Balfour Building,
351 California Stret,
San Francisco, California.
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ARCHIBALD B. TINNING,
T. P. WITTSCHEN,
924 Main Street,
Martinez, California.

Attorneys for Appellee.

[Endorsed]: Filed Feb. 21, 1939. Paul P.
O'Brien, Clerk.

[Title of District Court and Cause.]

TESTIMONY

Wednesday, April 13, 1938.

The Court: You may proceed with the Six Companies Case.

Mr. Marrin: May it please the Court, we have a number of formal matters in connection with the execution of the contract which the defendant is ready to produce, and which we are going to put in by stipulation, thus saving as much time as possible. Mr. Tinning, you have the resolution of March 30, 1933?

Mr. Tinning: Yes.

Mr. Marrin: Will it be stipulated that is a certified and correct copy of a resolution adopted by the Board of Directors of the defendant Joint Highway District No. 13 on March 30, 1933, approving final surveys, plans, specifications, and detailed drawings and final estimate of cost of the project proposed to be constructed by the Defendant, Joint Highway District No. 13, and directing a certified copy thereof be transmitted by the Secretary of the District to the Director of the Department of Public Works of the State of California for his approval.

Mr. Tinning: So stipulated.

Mr. Marrin: We offer this in evidence.

The Court: It will be admitted and marked.

(The document was marked "Plaintiff's Exhibit 1.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page-1.]

Mr. Marrin: In connection with all these matters, Mr. Tinning, will it be stipulated that inasmuch as these are copies they will be subject by both sides to comparison and check as to their correctness?

Mr. Tinning: Yes. Except as to the certified copy of the Resolution. I have not brought the original minutes, they are very voluminous, but they have all been double compared. Except as to those things I think in every instance I have an original here. I have the original plans here if you desire to inspect [486] them, of the project.

Mr. Wi'schen: May we have an understanding both ways, that when exhibits are going in and are copies that they are put in subject to correction?

Mr. Marrin: Surely. Will it be stipulated that these are the original plans?

Mr. Tinning: Those are a copy, and the original plans are here. They are in exactly the same form, and the filed plan has the endorsement of the secretary's file on this date. Those are originals taken from the same——

Mr. Marrin: We will stipulate, then, that this is a correct copy of the Plan for Construction of the Project of Joint Highway District No. 13 of the State of California, adopted by the resolution of the Board of Directors of Joint Highway District No. 31 by the Resolution which has been introduced as Plaintiff's Exhibit No. 1.

Mr. Tinning: March 30, 1933.

Mr. Marrin: I offer these in evidence as Plaintiff's Exhibit.

(The plans were marked "Plaintiff's Exhibit 2.")

Mr. Marrin: Will it be stipulated that this document entitled "Joint Highway District No. 13 of the State of California—Specifications for Construction of Project including Highway, Highway Tunnel and Approaches with Appurtenant Structures," is a true copy of the specifications for the construction of the project, with the exception of the Engineer's Estimate, which was filed on March 30, 1933, and was adopted by the Resolution of the Board of Directors of the District, which has been introduced in evidence as Plaintiff's Exhibit No. 1?

Mr. Tipping: The specifications are a true copy and I think under our act the estimates are a separate document, call for a [487] separate document. The copy of the estimate is a true copy of the copy of the specifications.

Mr. Marrin: We offer in evidence first the specifications for the construction of the project which I have described.

(The document was marked "Plaintiff's Exhibit 3.")

[Set forth in the Book of Exhibits at page 4.]

Mr. Marrin: We next offer in evidence the Engineer's Estimate.

(The document was marked "Plaintiff's Exhibit 4.")

PLAINTIFF'S EXHIBIT 4

FINAL ESTIMATE OF COST

A. Tunnel with Ventilation and Portal Structures	\$2,808,286.74
B. Main Roadway:	
West of Tunnel.....	\$396,401.54
East of Tunnel.....	52,514.28 \$ 448,915.82
C. Landvale and Berkeley Connections.....	233,062.97
	<hr/>
	\$3,490,265.53
Add Engineering, Supervision and Overhead, 7½%	\$ 261,769.91
	<hr/>
	\$3,752,035.44

(Signed) WALLACE B. BOGGS.

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No. 20101-R. Plff's Ex. No. 4. Filed April 13, 1938. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Mr. Marrin: Will it be stipulated that this is a true copy of the certificate of Earl Lee Kelly dated April 5, 1933, approving the final surveys, plans and specifications and detailed drawings theretofore prepared by Joint Highway District No. 13 for the construction of its project, and adopted by the Board of Directors on March 30, 1933?

Mr. Tinning: So stipulated.

Mr. Wittschen: Give Mr. Kelly's official title.

Mr. Tinning: Director of the Department of Public Works of the State of California.

Mr. Marrin: We offer that in evidence.

(The document was marked "Plaintiff's Exhibit 5.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Resolution of the Board of Directors of Joint Highway District No. 13 of the State of California approving amendments and supplements to specifications accompanying and forming a part of the final surveys, plans, specifications, detailed drawings, including a final estimate of cost, of the project proposed to be constructed by Joint Highway District No. 13 of the State of California, filed by Wallace B. Boggs, District Engineer, with the Board of Directors of said Joint Highway District on the 9th day of January, 1934, and directing a certified copy thereof to be transmitted by the [488] secretary of this District to the Director of the Department of Public Works of the State of California for his approval," is a true copy of a resolution adopted by the Board of Directors approving first amendment to the specifications, which resolution was adopted on January 9, 1934?

Mr. Tinning: So stipulated.

Mr. Marrin: We offer that in evidence.

(The document was marked "Plaintiff's Exhibit 6.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Joint Highway District No. 13 of the State of California, Amendments and Supplements to Final Specifications for Construction of

Project, including Highway, Highway Tunnel and Approaches, with Appurtenant Structures" is a true copy of an amendment to the specifications prepared by the District which was adopted by Resolution of the Board of Directors on January 9, 1934?

Mr. Tinning: So stipulated. For the sake of the record, Mr. Marrin, I might say these are the amendments that were required under the P.W.A. grant to meet their requirements.

Mr. Marrin: We offer that in evidence.

(The document was marked "Plaintiff's Exhibit 7.")

[Set forth in the Book of Exhibits at page 140.]

Mr. Marrin: Will it be stipulated that this document is a true copy of the certificate signed by Earl Lee Kelly, Director of the Department of Public Works of the State of California, dated January 15, 1934, approving the amendments to plans and specifications for the project of the defendant as adopted by the Board of Directors of the defendant on January 9, 1934?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 8.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Resolution of the Board of Directors of Joint Highway District [489] No. 13 of the State

of California approving second amendment and supplement to specifications accompanying and forming a part of the final surveys, plans, specifications, detailed drawings, including a final estimate of cost, of the project proposed to be constructed by Joint Highway District No. 13 of the State of California; filed by Wallace B. Boggs, District Engineer, with the Board of Directors of said Joint Highway District on the 3rd day of April, 1934, and directing a certified copy thereof to be transmitted by the Secretary of this District to the Director of the Department of Public Works of the State of California for his approval," is a true and correct copy of a resolution of the Board of Directors of Joint Highway District No. 13 adopted at a meeting of the Board of Directors held on April 3, 1934?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 9.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Joint Highway District No. 13 of the State of California, Second Amendment and Supplement to Final Specifications for Construction of Project, Including Highway, Highway Tunnel and Approaches with Appurtenant Structures, Adopted April 3, 1934," is a true and correct copy of the Second Amendment to the Plans and Specifica-

tions for the construction of the project of the District which was adopted on April 3, 1934?

Mr. Tinning: So stipulated.

Mr. Marrin: We offer that in evidence.

(The document was marked "Plaintiff's Exhibit 10.")

Mr. Marrin: Will it be stipulated that this document is a true and correct copy of a certificate executed by Earl Lee Kelly, under date of April 6, 1934, approving the second amend- [490] ment to the plans and specifications for the project of Joint Highway District No. 13, approved by the Board of Directors by resolution dated April 3, 1934?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 11.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Resolution of the Board of Directors of Joint Highway District No. 13 of the State of California giving notice to contractors that bids for the construction of the project of the district will be received and directing publication thereof" is a true and correct copy of a resolution adopted by the Board of Directors of defendant on May 4, 1934, and directing that notice shall be given to contractors for the submission of bids on the project of the District?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 12.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that the document entitled "Affidavit of Publication, In the Matter of Joint Highway District No. 13 State of California, Notice to Contractors," is a true and correct copy of an affidavit of publication in the Oakland "Tribune" of the Notice to Contractors, a copy of which is attached thereto?

Mr. Tinning: So stipulated.

Mr. Marrin: And it will be stipulated that that notice was published in the Oakland "Tribune" on the dates set forth in the affidavit?

Mr. Tinning: Yes.

Mr. Marrin: I offer that in evidence. [491]

(The document was marked Plaintiff's Exhibit 13.)

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Joint Highway District No. 13 of the State of California. Bid Forms. 1. Bidder's Proposal Sheet; 2. Bidder's Certificate of Compliance with N.R.A.; 3. Bidder's Statement of Experience, Financial Responsibility and Technical Ability," is a true and correct copy of the bid submitted

by the plaintiff to the defendant on May 22, 1934, for the construction of the project of defendant?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 14.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document is a true and correct copy of the resolution adopted by the Board of Directors of the Defendant on May 29, 1934, awarding to plaintiff a contract for the construction of the project of defendant upon which plaintiff submitted a bid to the defendant on May 22, 1934.

Mr. Tinning: So stipulated.

Mr. Marrin: I will offer that in evidence.

(The document was marked "Plaintiff's Exhibit 15.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Contract" between Joint Highway District No. 13 of the State of California and Six Companies of California, dated June 4, 1934, and signed by Joint Highway District No. 13 of the State of California by Thomas E. Caldecott, President and Harry M. Stow, Secretary, and by Six Companies of California, a corporation, by S. D. Bechtel, President and Edgar S. Kaiser, Secretary, is a true and correct copy of a contract entered into

between the plaintiff and the defendant for the construction of the project of the defendant?

Mr. Tinning: So stipulated. [492]

Mr. Marrin: I offer that in evidence, as "Plaintiff's Exhibit 16."

(The document was marked "Plaintiff's Exhibit 16.")

[Set forth in the Book of Exhibits at page 157.]

Mr. Marrin: Will it be stipulated that this document which is in my hand is a true and correct copy of a resolution adopted by the Board of Directors of Plaintiff on June 4, 1934, authorizing the officers of plaintiff to execute the contract and bonds between plaintiff and defendant for the construction of the project of defendant?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 17.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document entitled "Bond for Faithful Performance," dated June 12, 1934, and executed by plaintiff and the surety companies named therein, is a true and correct copy of the bond for faithful performance of the contract between plaintiff and defendant for the construction of the project of defendant?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 18.")

[Set forth in the Book of Exhibits at page 198.]

Mr. Marrin: Will it be stipulated that this document entitled "Bond for Materialmen and Laborers," dated June 12, 1934, and executed by plaintiff and the surety companies named therein, is a true and correct copy of the bond for materialmen and laborers which was filed with and approved by defendant in connection with the contract between plaintiff and defendant for the construction of defendant's project?

Mr. Tinning: So stipulated.

Mr. Marrin: I will offer that in evidence. [493]

(The document was marked "Plaintiff's Exhibit 19.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that this document is a true and correct copy of a resolution adopted by the Board of Directors of Defendant on June 14, 1934, approving the faithful performance bond filed by plaintiff with defendant?

Mr. Tinning: So stipulated.

Mr. Marrin: I offer that in evidence.

(The document was marked "Plaintiff's Exhibit 20.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated that the document I have in my hand is a true and correct copy

of a resolution adopted by the Board of Directors of defendant on June 14, 1934, approving the bond for materialmen and laborers, filed by plaintiff with defendant?

Mr. Tinning: So stipulated.

Mr. Marrin: I will offer that in evidence.

(The document was marked "Plaintiff's Exhibit 21.")

[Note: See Agreed Statement of Counsel set out in the Book of Exhibits at page 1.]

Mr. Marrin: Will it be stipulated, Mr. Tinning, that the contract and specifications, plans and amendment thereto were prepared by defendant District?

Mr. Tinning: Yes.

Mr. Marrin: Have you the geological report referred to in the plans and specifications?

Mr. Tinning: Yes.

Mr. Marrin: Will it be stipulated, Mr. Tinning, that this document dated June 23, 1932, entitled "Geological Report" addressed to Mr. George A. Posey, District Engineer, Joint Highway District No. 13, 454 Fifth Street, Oakland, California, and signed by George D. Louderback, Consulting Geologist, is the original geological report referred to on page 58, Section 32, sub-section 4 of the specifications which have been introduced in evidence? [494]

Mr. Wittschen: Mr. Marrin, we will stipulate to the correctness of the identity and will not require you to prove the report, but will reserve all rights to object to the introduction of the reports in evi-

dence and the stipulation is not to be deemed to go further than merely save you the necessity of proof.

Mr. Marrin: I understand that. Your stipulation simply goes to the identity of this document, that it was the document referred to in the specifications?

Mr. Wittschen: Correct. You do not have to waste any time proving it, but we will object to its introduction.

Mr. Marrin: I offer this document entitled "Geological Report" in evidence.

Mr. Wittschen: We object to the introduction of that report in evidence, not only on the ground that it is incompetent, irrelevant, and immaterial, but on the further ground that it has no part in this case, and is an attempt to vary the contract between the parties. If your Honor will permit, I have some authorities I would like to present and argue that matter.

The Court: Well, I will offer this as a suggestion.

Mr. Wittschen: Certainly.

The Court: Probably in the interest of time, that it go in subject to your motion to strike and over your objection.

Mr. Wittschen: Yes.

The Court: And you may renew your motion at the end of the trial in relation to it. Make a note of it. Then I will be in a better position to rule after I get the picture.

Mr. Wittschen: Certainly.

Mr. Marrin: There is no objection, your Honor, to substituting a copy, which I understand Mr. Tinning desires to do.

Mr. Tinning: To save time later, the Geological Report, that [495] copy has certain maps and matter that were prepared under Dr. Louderback's direction, and were prepared by the District, and are not attached to this original document, and I am going to give you what you received from us, all those matters, to save time, later.

Mr. Marrin: Well, it will be stipulated, then, that the copy of the maps and profiles attached were true copies of what was submitted to bidders in connection with this contract?

Mr. Tinning: Yes.

Mr. Marrin: And, as you stated, it was received by us from you?

Mr. Tinning: Yes.

Mr. Marrin: I offer that in evidence.

Mr. Tinning: Subject to our objection.

(The document was marked "Plaintiff's Exhibit No. 22.")

[Set forth in the Book of Exhibits at page 212.]

Mr. Wittschen: Note an exception.

CHAD F. CALHOUN,

Called for the Plaintiff; sworn.

The Court: Q. What is your business or occupation?

(Testimony of Chad F. Calhoun.)

A. I am at present general manager of the Calhoun Company.

Q. What is the nature of their business?

A. It is oil well tubular supplies, oil well supplies.

Mr. Marrin: Q. Mr. Calhoun, I show you Plaintiff's Exhibit No. 16, which is a contract between Joint Highway District No. 13 and Six Companies of California, which is dated June 4, 1934. Prior to the date of that contract did you learn that the Joint Highway District No. 13 had advertised for bids for that contract? A. Yes, I did.

Q. When did you learn that?

A. In the forepart, the first part of February, 1934.

Q. How did you learn it?

A. First through the publication in the [496] Western Construction News Bureau Service and then by direct contact with the Chief Engineer of the Joint Highway District, Mr. Boggs.

Q. Did you take any action toward looking toward the preparing of the cost estimate for submitting a bid for that contract?

A. Yes, I did.

Q. Will you state what you did?

Mr. Wittschen: Was that for the Six Companies?

Mr. Marrin: It was not directly for the Six Companies. This was before the Six Companies was organized. We will connect it up later.

(Testimony of Chad F. Calhoun.)

Q. Will you state what you did?

A. I contacted the District Office through Mr. Boggs and secured the plans and specifications that were advertised in the official notice. I took those plans and specifications and made a complete study of all of the features that would relate particularly to the cost.

Q. What do you mean by "contacted"? Did you talk to him?

A. I talked to Mr. Boggs both over the phone and interviewed him in his office.

The Court: Who is Mr. Boggs?

Mr. Marrin: Who was Mr. Boggs?

A. The chief engineer for the Joint Highway District No. 13.

Q. You secured a copy of the plans and specifications?

A. I secured a copy of the plans and specifications as soon as they were made available to me by the District, which was around the forepart of February, as I now recall, February, 1934, and from those plans and specifications I made a thorough study of all of the construction features and some of the legal features, and the financial set-up of the district.

Q. Did you ever talk to Mr. Boggs about the Geological Report? [497]

Mr. Wittschen: I object to the question on the ground it is immaterial, irrelevant, and incompetent, and on the further ground the conversation with an

(Testimony of Chad F. Calhoun.)

employee is not binding on the District. You asked if he talked to him. I suppose my objection is premature.

Mr. Marrin: I want to bring out and offer to prove by this witness that this witness called at the office of the Joint Highway District No. 13 and asked the Chief Engineer for a copy of the Geological Report, which was mentioned in the specifications, and that he was told they did not have copies for distribution, but was shown a copy of the report and made a copy thereof, and a tracing from one of the profiles attached there, and also that Mr. Boggs gave to this witness an estimate of the cost of constructing the project. Mr. Boggs is the Chief Engineer. He will be rather prominent in this case because he was in charge of the defendant's office, and we think the proof is competent and binding on the District. Now, the specifications put out by the district refer the bidders to this Geological Report which is in the office of the District.

Mr. Wittschen: There is no question but what they had a right to look at the Geological report, but my objection is not directed to that, but the estimate of Mr. Boggs is his official estimate, which is on file, a copy of which you have, and the plans and specifications, but no conversation with Mr. Boggs can vary the written document. My objection is a little premature, because you have not asked him for the conversation yet.

(Testimony of Chad F. Calhoun.)

The Court: Did you talk to him? You may answer "Yes" or "No." A. Yes, I did.

Mr. Marrin: Q. What did you say and what did he say?

Mr. Wittschen: Objected to on all of the grounds previously [498] stated, it is immaterial, irrelevant, and incompetent, and that the District is not bound by conversations with Mr. Boggs or any other officer, and that the report speaks for itself, and that the defendant bid upon plans and specifications, and nothing else, not on a conversation.

The Court: Is your record complete?

Mr. Marrin: I simply want to show at this time by this witness that he asked for a copy of the Geological Report as I stated, and that Mr. Boggs showed him a copy, or at that time a copy was handed to him.

Mr. Wittschen: Exception.

The Court: Are you sure you copied it?

A. Yes, I did.

The Court: Proceed.

Mr. Marrin: Q. I show you Plaintiff's Exhibit No. 22 and ask you if that is a copy of the document which Mr. Boggs showed you?

A. As far as the written part is concerned, the text, that appears to be a copy of the report which I examined at that time, which was furnished me, but this report does not contain one profile-section that was in the report I examined at that time.

(Testimony of Chad F. Calhoun.)

Mr. Tinning: If you will give us the date I will try to check up and see what that is.

Mr. Marrin: About when did you examine that report?

A. As near as I can recall, it was around the middle of February.

Q. I think you said that the written matter was the same but there was some difference in the profile.

A. That is right.

Q. Did you read that report?

A. Yes, I did. I read it in its entirety.

Q. Did you copy any part of it?

A. I made notes on the forepart of the report that pertained to the outside construction, that is, the highway construction, and some of the viaduct work. I made a complete longhand copy of that portion pertaining to the highway [499] tunnel.

Q. Will you state the pages in the report of which you made a complete longhand copy?

A. Using the paging that is in this copy, I made a complete longhand copy of all of pages 13, 14, 15, 16, 17, 18 and 19.

Q. I show you, Mr. Calhoun, a profile which has on it "Broadway Tunnel, Joint Highway District No. 13, Geological Report, By George E. Louderback, July, 1930" with the notation "Copied from Report 2/17/34, C. F. C.," and ask you if you can tell me what that is?

A. Well, this is a photostatic reproduction of an exact copy or tracing that I made from a profile sec-

(Testimony of Chad F. Calhoun.)

tion attached to the report which I examined, as furnished to me by Mr. Boggs on February 17, 1934. This tracing or copy which I made was from a profile section attached to the report at that time, but which is not included in this exhibit here submitted to me previously.

Mr. Marrin: I offer that in evidence.

Mr. Wittschen: Objected to upon the ground that it is immaterial, irrelevant and incompetent, and furnishes no basis for proving any issue in this case.

Mr. Marrin: It is offered for the purpose of showing the representations which were made by the defendant to the plaintiff, or the inducement for entering into this contract.

Mr. Wittschen: I would like to be heard.

Mr. Marrin: On the issues of fraud, mistake and warranty.

Mr. Wittschen: I would like to make a few observations as to that. One is that this witness at that time was not working for the plaintiff, and, secondly, the authorities hold that the highway contractor cannot base his bid upon statements made by employees of the contracting party; he bases his bid up on the [500] contract and upon the specifications and since this Geological Report expressly was excepted from the specifications and there was a statement therein that the bidder was not to rely upon the same, but was to do his own geology; it was merely that he could look at it if he wished, and he

(Testimony of Chad F. Calhoun.)

expressly agreed that he would not hold the District responsible for anything connected therewith. It has no part in this case.

Mr. Marrin: If your Honor please, I do not agree with Mr. Wittschen's interpretation of the cases and on the question of the admissibility of statements made by the District Representative, and documents which they display to prospective bidders. I should like to cite to the Court the case of Stanton v. Morris Construction Company, a Minnesota Case, cited in 199 N. W. 104. In that case the County had prepared a map showing certain conditions to exist, and the attention of the bidders was called to the map. The plaintiff in this case, a contractor, had called at the office of the defendant, and certain statements had been made to the contractor by the engineer of the defendant, and the map was displayed to the contractor, and the map was offered in evidence and objection was made to it on the ground that Mr. Wittschen has made, that it was not part of the contract, and the Court said on that point:

"The claim made in the oral argument that the survey map was not a part of the plans and specifications of the contract and is not in evidence, cannot be sustained. It was offered by plaintiff, and was treated as received during the whole trial."

That, of course, is a little different than the case here. But the Court said:

(Testimony of Chad F. Calhoun.)

"Its importance to the vital issue in the case does not depend upon its being a part of the contract, but upon the fact [501] that the representations thereon were intended to and did induce defendant to make its bid and execute the contract."

Now in this case, if your Honor please, we have brought suit upon a common count which is a form of action that is well recognized in this State as being the proper form of action in case of a rescission of the contract; where the contract is rescinded for breach by the defendant, when it is rescinded for fraud or mistake, whether the fraud is implied or actual; the plaintiff cannot bring an action on the contract, but must sue on the common count. Now, it is well recognized in that class of cases that the plaintiff has the right not only to introduce the contract, but also to introduce any evidence of its breach.

In the case of *Brown v. Crown Gold Milling Company*, 150 Cal. 376, which was a case which was brought in the form of quantum meruit, and the plaintiff in the case introduced evidence of the express contract, and its breach, the Court held that the evidence was properly admitted and stated:

"Here the action is brought not upon an express contract, but upon a quantum meruit to recover the reasonable value of services. The contract which was shown by the evidence of plaintiff to have been made was not proven for the purpose of recovering upon it, but for the purpose of showing that it was

(Testimony of Chad F. Calhoun.)

entered into between himself and the defendant, its terms, and a breach of it on the part of defendant by discharging him without cause, for the purpose of recovering on a quantum meruit the reasonable value of the services he performed under it prior to its breach."

Now, in *Castagnino v. Balletta*, 82 Cal. 250—these cases, by the way, are cited in our trial brief—the Court held that the form of action on quantum meruit was proper; that evidence of the contract and its breach could be received. The Court [502] stated that the form of action on quantum meruit has been too long and too well settled in this State to be the subject of further debate or controversy, and quotes the following from *Greenlief on Evidence*, as a proper case for the use of the common counts:

"Where the contract, though partly performed, has been either abandoned by mutual consent, or rescinded and extinct by some act on the part of the defendant. Here the plaintiff may resort to the common counts alone for remuneration for what he has done under the special agreement."

And it says as to the admissibility of the evidence:

"In this case there is evidence tending to show that the architect accepted the building; that all other preliminaries were complied with by the plaintiff, and nothing remained but the payment of the money. The pleader, under such a state of facts, could set forth his cause of action under the com-

(Testimony of Chad F. Calhoun.)

mon counts adopted by him in accordance with the rules above set forth. And under such counts the special contract was admissible in evidence. (See *Reynolds v. Jourdan*, 6 Cal. 109, where it was held that the special contract was admissible under the common counts as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion."

In another case, *Breen v. Roy*, 8 Cal. App. 475, the plaintiff was permitted by the Court to introduce the special contract and show that he was prevented from recovering it.

Now, the cases are very clear, if your Honor please, that in this form of action plaintiff may introduce a special contract and may show all of the breaches of the contract. If the plaintiff could not show the representations which had been made [503] as an inducement to enter into the contract the plaintiff would have no way to prove its right to rescind for fraud or for mutual mistake. And it is well settled in this State that the parol evidence rule does not prevent the admission of evidence to show misrepresentation in entering into a contract.

In the case of *Ferguson v. Koch*, 204 Cal. 342, the Supreme Court of this State said:

"Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent

(Testimony of Chad F. Calhoun.)

the proof of fraud. Hence, the fact that the sale of an automobile is evidenced by a written contract will not prevent the purchaser from proving by parol evidence that the sale was induced by fraud. And this is true, even though the contract recites that all conditions and representations are embodied therein. There is no such sanctity surrounding a writing that parties may not be permitted to go back of it and show that there was such fraud practiced in the procurement of the same as to vitiate the writing. The law never countenanced a rule which would deny to one the right to prove that fraud had been practiced on him. In actions for rescission upon the ground of fraud the statutory provisions that when the terms of an agreement have been reduced to writing such writing is to be considered as containing all the terms, and that the execution of a contract supersedes all prior negotiations or stipulations, have no application and do not control. Appellant has cited us to certain earlier cases in our reports which he claims make a distinction between fraudulent representations going to induce the making of a contract and representations in the nature of warranties. There is no reason why any such distinctions should exist, and, in fact, none does exist." [504]

Now, then, there is another reason, if your Honor please, why we may introduce any evidence which we desire in this case on the parol question. Plaintiff sued on a common count. The defendant has

answered and set up a special contract by way of defense and avoidance. It is a well-established rule in this State that in such a state of the pleadings the plaintiff is free to introduce any evidence it has to overcome, set aside and void a special contract. I cite your Honor to the case of *Maxwell v. Jimeno*, 89 Cal. App. 612, in which case the plaintiff had sued upon a common count for money alleged to be due him for services. The answer set up an express contract and alleged that the services were performed under it. The lower court found that the contract was obtained by false and fraudulent representations and that plaintiff repudiated, canceled and rescinded it. Defendant appealed, urging that as the complaint did not allege fraud plaintiff could not prove it. However, the Court said at page 614:

"In *Sarnighausen v. Scannell*, the Court says: 'Under our form of pleading, there is no opportunity offered for the filing of a replication to the answer. When affirmative matter is pleaded as a defense it is deemed to be denied. Thus, where a contract is set up as a special defense, plaintiff, without pleading such matter, may show that it was procured by fraud, menace or duress, or that it has been rescinded.'"

And in *Moope v. Copp*, 119 Cal. 429, the Court said:

"Where the defendant has pleaded a written instrument in defense (not by way of cross-complaint), and the plaintiff has not served and filed an

(Testimony of Chad F. Calhoun.)

affidavit denying the instrument, and has offered no evidence controverting it on any ground, the instrument is to be deemed admitted and must be taken for what it appears on its [505] face to be. But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses under Section 462 of the Code of Civil Procedure. In short, he may by evidence controvert the instrument upon any and all grounds, except that he cannot controvert its due execution nor its genuineness. By 'genuineness' is meant nothing more than that it is not spurious, counterfeit, or of different import on its face from the one executed, but is the identical instrument executed by the party."

Now, there is one other matter I would like to mention briefly, and that is the effect of the self-exonerating cause in this contract. The defendant in this case drew the attention of prospective bidders to this geological report and referred them to this information. It must have done so, as the Circuit Court of Appeals in this Circuit said in the Sartoris Case, for some purpose, and that purpose was unquestionably to influence the bid. Now, the defendant, in our opinion, cannot escape the responsibility for the representations it makes by saying that "I represent this to be so and so and represent this to be the fact, but I disclaim any liability for it."

(Testimony of Chad F. Calhoun.)

The decisions on the effect of the self-exonerating clause are referred to and summarized in the Passaic Valley Case—there are several of them in the United States Supreme Court, and other decisions which I will not burden you with this morning, but I would like to refer to this case and read a quotation from it as I believe it sets forth the law on this subject.

This Passaic Valley Sewerage Commissioners v. Holbrook, 6 Fed. (2d) 721, was a case in which a contract had been entered into for the construction of a sewer tunnel. The defendant in [506] that case had made borings and had transcribed the result of those borings on a certain map, which borings indicated that the formation would be a cemented Triassic formation, and would be impervious to water and air. It attached the following notation:

“The borings, soundings, contour lines, profile and indications of rock outcroppings, sub-surface materials, pipes, and other underground structures are supposed to be approximately correct, but should they be found to be otherwise the contractor shall have no claim on that account, it being expressly understood that the Commissioners do not warrant the plot to be approximately correct.”

When it was found that the condition was not as indicated on the maps which were displayed by the defendant district to the bidder, prior to entering into the contract, and after the contractor had proceeded to some extent under the contract, it re-

(Testimony of Chad F. Calhoun.)

scinded the contract on the ground of breach of warranty, misrepresentation, mistake and fraud, and brought suit on quantum meruit, the same as we have here, to recover the actual cost of the labor performed, services rendered, and material furnished in the work. The defendant, after suit was brought, brought up this self-exonerating clause as a defense, saying while it displayed this information it did not warrant it in any way, and warned all bidders to make their own examination, but after reviewing the decisions of the Supreme Court of the United States on this point at some length the Court said:

“The last case on the subject and one containing facts which resemble closely those of the instant case, is *United States v. Atlantic Dredging Company*, 253 U. S. 1, where the self-exonerating clause in the contract there in question was similar to and just as strong as the clause here in question. In that case the [507] Supreme Court, citing its previous decisions, announced the law that, when a governmental body has asked for bids for excavation work and has represented the condition of the material to be excavated, and in its representations had misstated facts or had failed to state facts within its knowledge, it cannot escape responsibility by a clause of the contract in which it required bidders to examine the work for themselves and in which it said that its statements of facts were but expressions of its opinion and that it did not guarantee

(Testimony of Chad F. Calhoun.)

them. This, in effect, was a holding that representations made in such circumstances import a warranty, and also that, in consonance with familiar law, a person cannot contract against his own fraud."

Now, if your Honor please, this action is not an action on a contract. It arises out of a contract, but it is, in our opinion, a form of remedy for the breach. It is an action to recover for the reasonable value of work performed and material supplied under an express contract upon the ground that the plaintiff was induced by the representations of the defendant, which were untrue, to enter into the contract, and that the defendant breached the contract during its performance, and we offer to prove through this witness that misrepresentations were made to him, that these representations were passed on by him to the men who made the estimate for the doing of this work for the plaintiff. In that connection, your Honor, the plaintiff was not organized until May 15, 1934. So that you may understand the situation, a certain number of contractors, including the W. A. Bechtel Company and the Henry J. Kaiser Company, and four others, had certain conferences, at which they decided to, if the project was feasible, prepare and submit a bid. They employed certain men, including Mr. Calhoun and Mr. Larson, who will follow him on the stand, [508] to make an estimate of this project, and they did so. After the estimate was

(Testimony of Chad F. Calhoun.)

made and it appeared that these parties desired to submit a bid, they caused the plaintiff to be organized. The work which these men did and the estimates which they made were turned in to the plaintiff and were relied upon by the plaintiff in making this bid, and it is necessary to show these facts through this witness and show his examination and the reliance upon the information which was received. I offer to prove all of those matters through this witness and the following witness.

Mr. Wittschen: If your Honor please, I had no idea that the argument was going to take the range that it did in my objection to the question that I presumed in advance called for a conversation between this witness and an employee of the district.

The Court: The District Engineer?

Mr. Wittschen: The District Engineer.

The Court: He was the engineer on the job?

Mr. Wittschen: Yes. As far as this particular thing that is before the Court now, it is moot, because Mr. Tinning tells me that this map, which they seek to have admitted in evidence, has already been admitted in evidence as one of the maps that are attached to the Geological Report which your Honor admitted subject to our motion to strike. Following that the action on Mr. Marrin's part precipitated this controversy. I am trying to fix my record. But in view of the fact that Mr. Marrin has argued the pleadings which are not involved in

(Testimony of Chad F. Calhoun.)

this issue at all, I might say that they cannot, because we have filed an answer setting up certain things, that they cannot prove anything that is not put in issue by that answer. Of course that is elementary. There is no replication. That is not the point of my objection. The point of my objection is entirely misunderstood. While I am on [509] my feet, and in view of the fact that we are arguing this matter, I want to point out that in the case of *McGovern et al v. City of New York* the rule is laid down that in an action by a subway contractor against the city, parol evidence as to the construction placed by the contractor on the specifications when he was preparing and submitting his bid, and as to declarations made by a former subordinate employee of the City as to the meaning of the specifications, is inadmissible to aid in the construction of the contract and specifications.

Mr. Marrin: What is the citation of that?

Mr. Wittschen: *McGovern et al v. City of New York*, 195 N. Y. S. 925.

I have only scratched the surface on that particular subject. I think it is elementary in this State that you cannot come in and bind a public body by something that some employee may say in connection with the plans and specifications. A public body can only be bound by the action of its Board of Directors, and when it asks a bidder to submit a bid upon plans and specifications which it has prepared the bidder cannot come in and chat with the

(Testimony of Chad F. Calhoun.)

engineer and then come up and say "I understood something else."

In the Stanton Case, that Mr. Marrin cited, it holds no such thing. He, himself, told your Honor that there was quite a distinction there because the plan which was under discussion was a plan that was a part of the plans and specifications under which the bid was to be submitted.

Now, I will state in advance, so that we can immediately pass over a great part of Mr. Marrin's argument, that this objection is not made because of the nature of his pleading. The objection is made because of the introduction of this document, which really was the matter that was to be reserved and argued afterward. We [510] contend that he is trying to vary the contract between the parties. Now, in addition to that case which I spoke of I would like to refer to one other case before I deal with the main subject, and that is United Construction Co. v. City of St. Louis. All of these cases are in our brief, of which counsel and the Court have a copy. In that case there was a contract just as ours for the construction of a tunnel, and there was a question as to the remarks that were made by the engineer in charge and this is what the Court said:

"This shows an erroneous view of the law. Work of this character must be let on competitive bidding and to the lowest bidder."

Section so and so of the Missouri Statutes provides: "Requires that contracts of this character

(Testimony of Chad F. Calhoun.)

made by municipalities must be made in advance of doing the work and in writing, which shall specify the price to be paid. The contract cannot be modified, changed, or enlarged by verbal promises, and any such promise to pay more for the work than the contract provides is void. Municipal officers"—not employees—"have no such powers, and can do nothing except to see to it that the contract is complied with as made, and the work and material paid ~~for as the~~ contract specifies. The intent of the law is to place all bidders and contractors on an exact equality without chance of favoritism, and, when the contract is once made, the officers in charge of the work are executive and not contracting agents of the city."

One contractor or one bidder cannot go in and chat with the officer in charge and say that he got certain promises and certain inducements that no other contractor received.

The thing that I am really objecting to, hereunder is the matter [511] upon which your Honor reserved judgment, and I have no desire to argue the matter now. If your Honor would like that argument at this time we will make it.

The Court: It will not be necessary. I want to indicate to both sides that in these cases I am rather liberal in the introduction of evidence with this thought in mind, that both sides may protect their legal rights, they waive none of their rights, and

(Testimony of Chad F. Calhoun.)

then rule after the case is in and I have a picture. I allow testimony to go in subject to a motion to strike, unless it misleads either side in the presentation of the case.

Mr. Wittschen. We are not misled. I think both of us understand each other.

The Court: That is what I aim to do in every case presented, and I suggest it now, so that it may be helpful, and both sides have a record to protect their rights. I will allow the testimony to go in subject to a motion to strike over your objection.

Mr. Wittschen: And it is understood that we have an exception to your Honor's ruling?

The Court: Yes.

Mr. Wittschen: I will just state my objection hereafter without arguing it.

The Court: It is necessary to do that under the rule anyway so as to save your record. [512]

(After Recess)

The Court: You may proceed.

Mr. Marrin: I am not quite sure of the state of the record. This was offered, was it?

Mr. Wittschen: You have already got it in, subject to strike.

Mr. Marrin: Well, not exactly. This is a print made by Mr. Calhoun, from this.

Mr. Wittschen: Well, I make the objection that I made heretofore, on all the grounds stated.

(The chart was marked "Plaintiff's Exhibit No. 23.")

[Set forth in the Book of Exhibits at page 259.]

(Testimony of Chad F. Calhoun.)

Mr. Wittschen: Note an exception, please.

Mr. Marrin: Q. I again show you Exhibit No. 22. On your examination, you stated that that was not entirely correct,—that copy—an entirely correct copy of what you examined. Do you want to correct your testimony, in any way, in reference to that point? A. Yes, I do. During the recess, I examined it and found there is a photostatic print in the back of the blueprint which I examined, which is a copy of the print from which I made the tracing which you showed me. It differs from the blueprint which is attached to the report.

Q. The tracing you made is this photostat copy which is Plaintiff's Exhibit No. 23?

A. That is right.

Q. Mr. Calhoun, did you have any discussion with Mr. Boggs, concerning the finances of the District? A. Yes, I did.

Q. What did you say and what did he say?

Mr. Wittschen: We object to that as incompetent, irrelevant and immaterial, calling for hearsay testimony, and not in any way binding on the District or tending to prove any issue in this case.

The Court: This is preliminary to what?

Mr. Marrin: Preliminary to showing, if your Honor please, that Mr. Boggs, in the course of that conversation, brought out the engineer's estimate, the cost of the project, and exhibited it to Mr. [513] Calhoun; and that Mr. Calhoun made a copy of

(Testimony of Chad F. Calhoun.)

that estimate, which he later turned over to Mr. Larson; and we offer to prove those facts.

Mr. Wittschen: We add to the objection, furthermore, that the total of the engineer's estimate had been prepared and was on file, and that any conversation between the parties proves no issue in the case.

The Court: I will allow it, subject to your objection.

Mr. Wittschen: Note an exception, please.

Mr. Marrin: Q. Will you state what was said, upon the conversation? A. I discussed many features of the contract and specifications with Mr. Boggs, covering many items of interpretation upon questionable items of both the plans and specifications. Those are more or less routine and in the nature of my duties in preparing an estimate. Then I discussed with him, at great length, the finances of the District, going over with him the amount of money available from which the District could pay for the entire construction cost of the project.

Q. Did he show you his estimate of the cost?

A. Yes, he showed me that estimate.

Q. Did you make a copy of his estimate of cost, which he showed you?

A. I made a copy from the estimate of cost which he showed me. I made it in the District office.

Q. I show you a pencil memorandum, headed "Broadway Tunnel—Engineer's Estimate of Cost

(Testimony of Chad F. Calhoun.)

of Joint Highway District No. 13, copied 2-17-34, C. F. C.," and ask you what that is.

A. This is the note and original copy of my handwriting that I made of that engineer's estimate in the District office, upon that date,—February 17, 1934.

Q. To the best of your knowledge, is that a true copy of the estimate which Mr. Boggs showed to you?

A. Yes, it is.

Mr. Wittschen: Pardon me, Mr. Marrin. Maybe I am a little confused. This says: "Above copied from typed copy shown to me by Mr. [514] Barclay in Mr. Boggs' office."

The Witness: Mr. Boggs—

Mr. Wittschen: I am not asking a question. I just wanted to bring that out.

Mr. Marrin: Q. Who showed you the estimate?

A. Mr. Boggs showed me the estimate. Mr. Boggs directed Mr. Barkley to make available for my use a table in an outer room there where I could examine not only the engineer's estimate in detail,—that is, at my leisure,—but, also, the geological report.

Q. Who was Mr. Barkley?

A. It was my understanding that Mr. Barkley was an assistant engineer to Mr. Boggs.

Mr. Marrin: I offer that document in evidence.

Mr. Wittschen: To which we will object as incompetent, irrelevant and immaterial, on the ground that it proves no issue, does not tend to, in any way,

(Testimony of Chad F. Calhoun.)

alter the contract between the parties and that the District and the contractor are bound by the contract as entered into between them, and not by any pre-bid conversation between any prospective bidder and an officer or an employee of the District.

The Court: I will allow it.

Mr. Wittschen: And on all the other grounds previously stated.

The Court: I will allow it, subject to a motion to strike and over your objection.

Mr. Wittschen: Note an exception, please.

(The document was marked "Plaintiff's Exhibit No. 24.")

(Testimony of Chad F. Calhoun.)

PLAINTIFF'S EXHIBIT 24

Broadway Tunnel

Engineer's Estimate of Cost of Joint Highway District No. 13

(Copied 2/17/34.—C.F.C.)

Item No.	Unit	Quantity	Labor	Materials	Other Items	Total
1	Grading	763,000	53,424	22,423	153,052	228,900
2	Overhaul	8,100,000	11,340	8,250	20,910	40,500
3	Stru. Exd.	44,000	60,500	198	5,302	66,000
4	Shoulders	362,000	2,534	3,630	1,076	7,240
5	Rein. Steel	4,420,000	55,252	114,920	28,727	198,900
6	Struc. Steel	445,000	4,005	12,549	5,696	22,250
7-8	Conc.	15,350	38,377	97,040	91,631	227,050
9-10	Conc. Pavs.	68,100	2,625	8,605	116	11,346
11	Asp. Surf.	44,000	88	3,146	285	3,520
12	Oil Mac.	724,000	3,864	72,561	10,454	86,880
13-16	(3,716 L.F., 4,300 S. ft. Curb-Gutter					
17	Sidewalks	21,000	277	1,234	1,887	3,400
18	Fill Protect	15	525	1,597	1,237	3,360
19-29	Pipe Cul.	9,340	30	105	15	150
30-39	Manholes, etc.	48	1,309	15,522	6,220	23,051
40	Drains	4,100	1,536	420	684	2,640
			56	3,075	1,994	5,125

(Testimony of Chad F. Calhoun.)

PLAINTIFF'S EXHIBIT 24 (continued)

Item No.	Unit	Quantity	Labor	Materials	Other Items	Total
41	Piping, 6"	2,020	272	1,360	2,407	4,040
42	Guard Rail	12,400	3,968	2,976	1,116	8,060
43	Hand Rail	640	90	528	662	1,280
44	Rip Rap	220	308		1,892	2,200
45	Metal Crib	46,000	276	4,600*	874	5,750
46	Gravel Found.	330	102	716	831	1,650
47-48	Tunnel	5,820	1,319,290)			(2,010,800
49	Cross Adits	322	5,131)	444,327	250,101	(8,050
50	Vent Bldgs.	L.S.	120,772	105,799	34,427	261,000
51	Vent Equip.	L.S.	12,000	80,000	16,350	108,350
52	Mech. Equip.	L.S.	12,000	20,000	2,000	34,000
53-4	Elect. Equip. & Carb. Mon. Det.	L.S.	41,000	140,000	21,620	202,620
55	Administration— Engr. & Inspection					173,923
						3,752,035

Above copied from typed copy showed to me by Mr. Barclay in Mr. Boggs' office.—C.F.C.

[Endorsed]: No. 20101-R. Plff's Ex. No. 24. Filed April 13, 1938. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Testimony of Chad F. Calhoun.)

Mr. Marrin: Q. Mr. Calhoun, what did you do with this copy of the engineer's estimate that has been introduced in evidence as Plaintiff's Exhibit 24?

A. Some time later, after copying it for my own information, I turned it over to Mr. L. M. Larson of the W. A. Bechtel Company.

Q. Can you state the approximate date upon which you turned it over [515] to Mr. L. M. Larson?

A. It was during the first week in March of 1934.

Q. You stated that you copied the geological report, which is Plaintiff's Exhibit No. 22, pages 13 to 19, inclusive. What did you do with the copy which you made of those pages of the geological report?

A. I made a copy, typewritten, and turned the copy of that,—that copy,—over to Mr. L. M. Larson of the W. A. Bechtel Company.

Q. About what time?

A. At about the same time; at the same time I gave him the engineer's estimate in the forepart of March 1934.

Q. What did you do with the tracing, a photostatic copy of which has been introduced in evidence as Plaintiff's Exhibit No. 23?

A. I also turned over that original tracing to Mr. L. M. Larson, at the same time that I turned over the other documents.

Mr. Marrin: You may cross-examine.

Cross-Examination.

By Mr. Tinning:

Mr. Tinning: Q. When you saw Mr. Boggs, it was on February 17, 1934, was it not?

A. I am not sure whether I saw Mr. Boggs on that date or not.

Q. The memorandum, the tracing, bears date in your handwriting,—just to refresh your recollection,—2-17-34? A. Yes.

Q. These are your initials, are they not?

A. Yes.

Q. You say at that time that you discussed the finances of the District,—that is, the funds that were available, or expected to be available, to pay the contractor who took this job?

A. I am not sure that I discussed it on that particular date; but right around that.

Q. How many times did you visit the District office on the occasion of these transactions that you testified concerning?

A. I don't recall exactly; but I was over there several times during that period in February, when I was making an intensive study of the plans. [516]

Q. Where was your office at that time?

A. 1522 Latham Square Building.

Q. Whom were you employed by?

A. Henry J. Kaiser Company.

Q. Mr. Kaiser is president of the Six Companies at this time, or at that time?

A. I really don't know, at that time.

(Testimony of Chad F. Calhoun.)

Q. Did you ever know he was president?

A. Well, so far as I knew, Mr. S. D. Bechtel was president of the Six Companies of California, it was my understanding. I believe that Mr. Kaiser became president some time later; but I am not sure of that.

Q. When you talked with Mr. Boggs about the financing of this District matter, you had, from what you told us about it—you had in mind that you satisfied yourself that there would be funds there available to pay the contractor?

A. No; I do not recall I had any such thing in mind at all.

Q. What was your purpose in discussing it with Mr. Boggs?

A. Well, just to see if they did have enough money to pay for the entire project.

Q. Then, shouldn't your answer to my preceding question be "Yes"? I am not trying to jockey you, Mr. Calhoun.

A. Maybe I better have the question repeated?

Q. Mr. Calhoun, all I was trying to do was clarify what the purpose of the conversation was,—your discussion of finances was for the purpose of knowing whether or not there would be funds to pay the contractor who took the contract?

A. Yes.

Q. At that same conversation, or one of these other conferences that you say you had with Mr. Boggs, you discussed the plans and specifications,

(Testimony of Chad F. Calhoun.)

you discussed the geological report, and you also discussed the estimate of breakdown of quantities and cost of the various elements that entered into this project, with him, did you not?

A. I discussed the various features of the plans and specifications and the [517] geological report, but not the breakdown of the estimate of cost, not in detail. Mr. Boggs supplied that information to me in connection with our discussion regarding the finances of the District.

Q. Then, on the same day that you discussed the finances of the District, you also discussed this sheet which has now been introduced,—the matters which are involved in that sheet that has been introduced as Plaintiff's Exhibit 24?

A. No; I am not sure whether it was the same day or not.

Q. What kind of a document was it that Mr. Boggs displayed to you?

A. You are referring now to—

Q. To what we have just been talking about,—the estimate made of the breakdown.

A. As I recall it, it was a typewritten sheet.

Q. One sheet, or in a book?

A. Well, to the best of my recollection, it was a sheet that was attached to several other sheets. I don't recall it was a book that was made available to me.

Q. Didn't you say, a few moments ago,—just to refresh your recollection, Mr. Calhoun,—that you

(Testimony of Chad F. Calhoun.)

went into another room, Mr. Barkley got out a book and you copied this data?

A. No; I said they made available to me the estimate.

Q. Well, what form was it in? Was it in several sheets, or were there six or seven or fifty sheets?

A. That is putting quite a strain on my memory. That was about four years ago, and I have examined many reports since then, and it is a little difficult for me to state definitely what form that was in. I will say this: that, at the time I was talking to Mr. Boggs, I do believe he had a copy of the estimate in a looseleaf book, which he referred to. Then, when he directed Mr. Barkley to make this information—the geological report and the estimate—available to me, I don't recall whether it was a book or whether it was another copy. [518]

Q. Do I understand that the copy of your original notes purports to be a copy of what was on the sheet that you saw there, even to the title, "Broadway Tunnel, Engineer's Estimate of Cost of Joint Highway District No. 13"?

A. Well, that is my own handwriting; and I cannot say that, as to the title, it would be exactly complete—only in keeping with my usual habit in such matters—I copy off enough to thoroughly identify it to my own satisfaction at that time.

Q. Was it all written at the same time? I am

(Testimony of Chad F. Calhoun.)

referring now to Plaintiff's Exhibit 24,—Your original memorandum.

A. It was all written at that particular time, with the exception of certain items here, under this column headed "Unit."

Q. The column headed "Unit" is for prices attributed to the quantities, is it not? 7

A. That is right.

Q. When was that written in?

A. That was written in after I returned to my office.

Q. Where did you get those figures?

A. By dividing the total estimated cost, over here, by the total shown against the quantity cost.

Q. In other words, you took the right-hand column, which is "Total," and divided the "Quantity," and that is the total in dollars, is it?

A. Well, that is the total in dollars, yes.

Q. Dividing the quantity with the unit, the various prices, and got the price per unit?

A. There is some question in my mind as to how that unit was arrived at. I am just trying to endeavor to give you a correct answer, because, as I say, it is of some standing. To the best of my recollection, that was the manner in which I determined the units there.

Q. So that, in this exhibit, you did not put down, from the records of the District, the unit prices that appear in the first column to the right of the various items as shown; those were com-

(Testimony of Chad F. Calhoun.)

puted by you, [519] by some method, and put down, yourself?

A. I believe that is correct, unless these units did show on the original copy. It is my recollection, though I worked those out, myself. If they appeared on the original, I also copied them from the original, that was submitted to me.

Q. Well, it is quite apparent, from looking at this, that those units—the figures were not written by the same pencil at the same time that the remaining figures on that sheet were made; isn't that true?

A. It appears to be that, yes.

Q. There are unit prices attributed only to certain items as shown here. Now, with respect to the memoranda at the bottom of the page: "Above copied from typed copy showed to me by Mr. Barkley in Mr. Boggs' office"—I am now referring to Plaintiff's Exhibit 24—Was that written at the same time, in Mr. Barkley's office, or Mr. Boggs' office, or was that put on at a later time?

A. That was put on as soon as I returned to my office.

Q. Those unit prices: you are uncertain, at this time, as I understand it, that they were computed by you, or whether they were found on the document from which you made the remainder of this copy?

A. That is right; but my best recollection is I divided the total in dollars by the quantities shown, and obtained that result.

(Testimony of Chad F. Calhoun.)

Q. In any conversation with Mr. Boggs that you had, you were advised, were you not, that the District would not receive bids,—I believe the date was set in March,—the notice would be recalled, due to some PWA requirement; you were advised, at that time when you talked to him, that the bids,—the actual bids,—would be called at some later date on the same plans and specifications?

A. No; I don't recall any such statement.

Q. You don't recall that?

A. No; I do not, at the time I was interviewing Mr. Boggs, at this particular time. [520]

Q. You have no memory of that information coming to you at that time?

A. No. I think there was some question that, under the discussion on the finances of the District—I am just recalling now—that there was pending before the courts a suit for the validity of the District bonds.

Q. To refresh your mind further: did you discuss the fact that there was a proceeding to be brought, to determine the validity of the bonds in this District, and that that was to be brought and it had not been commenced?

A. Well, I think you could answer that better than I can.

Q. I am trying to refresh your memory as to that conversation. But your testimony now is, in the present state of your memory, you did not re-

(Testimony of Chad F. Calhoun.)

ceive any information at the time you were going over the District figures and specifically estimating the outside work, that the bids would not actually be received at the time the notice called for, that there would be a notice withdrawing that matter, that would and it would be republished ?

A. As I recall it, it was around the first part of March when we received such information.

Q. But you did receive such information just before you turned the papers over to Mr. Larson and whoever else you turned it over to?

A. Yes.

Q. Is the reason you turned them over that the matter was being delayed?

A. No, no; not at all.

Q. Was Mr. Larson also working for Mr. Kaiser at that time?

A. Mr. Larson, at that time, was, I believe, working for the W. A. Bechtel Company.

Q. Another one of the units ultimately joined in this proceeding?

A. Yes.

The Court: We will take a recess now until two o'clock.

(Thereupon, an adjournment was taken until 2 o'clock p. m., this date.) [521]

(Testimony of Chad F. Calhoun.)

Afternoon Session—2:00 O'Clock.

CHAD F. CALHOUN,

Cross-Examination (Resumed).

Mr. Tinning: Q. Mr. Calhoun, in looking over my notes that I took of your testimony this morning there are one or two things I would like to make clear, or that perhaps I am not clear on, myself.

I understood you to say you were employed when you made this investigation in February, 1934 by Henry J. Kaiser. Were you employed by Mr. Kaiser personally, or by the Henry J. Kaiser Company?

A. It may have been the Kaiser Paving Company at that time, I am not exactly sure. My actual conditions of employment were made with Mr. Kaiser, personally.

Q. He made the arrangement with you.

A. Yes.

Q. You don't recall at that time whether you were an employee of the Henry J. Kaiser Company or the Kaiser Paving Company?

A. I think my employment at that time was possibly directly with the Kaiser Paving Company.

Q. Did you have anything more to do with the transaction or investigation of this work than you have explained this morning, starting sometime in February, 1934 and concluding in the first week, or the first few days of March of 1934 prior to the

(Testimony of Chad F. Calhoun.)

time the bids were actually received by the District on May 22nd, 1934? A. Yes, I did.

Q. What did you do after the time that you turned over the papers that you have referred to to Mr. Larson?

A. I completed an estimate on all of the outside work. By the outside work I mean all of that work not incorporated in the tunnel construction proper.

Q. You had worked for Mr. Kaiser prior to February, 1934? A. Yes.

Q. How many years?

A. It was not a matter of years that I worked [522] directly for Mr. Kaiser. That particular term of employment commenced on January 2, 1934.

Q. In connection with this work particularly, or generally for his company?

A. Generally for his company.

Q. Do you recall whether you saw the plans and specifications for this work previous to the time you had the conference with Mr. Boggs which, I believe, was on the 17th of February, 1934?

A. It is my recollection that I did.

Q. Isn't it a fact, or don't you know as a fact, that the Henry J. Kaiser Company secured the plans and specifications from the District on the 31st day of January, 1934?

A. I don't know the exact date. I secured those plans and specifications, myself.

Q. You did?

(Testimony of Chad F. Calhoun.)

A. For the Henry Kaiser Company.

Q. The first set? A. Yes.

Q. That was secured?

A. That is right. I talked to Mr. Boggs about it over the phone about the exact time they would be available.

Q. After examining the plans and specifications that you had secured for the Henry Kaiser Company you then went and had this conference with Mr. Boggs?

A. Well, you speak of "this conference." I don't recall that I mentioned any particular conference. I think I saw Mr. Boggs several times.

Q. You testified this morning that you had a conversation with him and that after you finished that conversation with him regarding the financial set-up, breakdown of the estimate, etc., you went into another room and you copied these figures which you made the pencil memorandum of, and you have a date on there as the 17th of February, 1934. That is Exhibit No. 24, that I am referring to. Did you have any conference with Mr. Boggs prior to that date? A. I believe that I did.

Q. Referring now to the conference that you believe you had, when [523] was that with respect, how many days before was it with respect to February 17, 1934, when you copied what now forms Exhibit 24? A. Will you repeat that, please?

(Question read.)

(Testimony of Chad F. Calhoun.)

A. I will answer that in this way: It is difficult for me to recall the exact date except in this one instance, and that is the time which I copied the estimate which has been introduced here and this geological report. The reason I am so definite as to that date is because of the particular notation I made on my own notes at that time. These other conferences I am unable to state the exact time or day which they occurred.

The Court: Whether they were before or after, you are not prepared to say?

A. No, I am not, but I think most of them preceded or were right around that particular day, February 17th. I am quite confident of that.

Mr. Tinning: Q. You have no definite recollection of conversing with Mr. Boggs subsequent to that date of the 17th when you made these memoranda that you have here, after that time?

A. I don't have any definite recollection. I may have had, and I may have had some before.

Q. How long did you continue to work for Henry J. Kaiser or the Kaiser Paving Company, whichever your employer was at that time, how long did you continue?

A. Until December 1st, 1934.

Q. When did you complete your estimate of the outside work?

A. I had the estimate on the outside work virtually complete along towards the latter part of February or the 1st of March, with the exception

(Testimony of Chad F. Calhoun.)

of a good many sub bids, of course, which were necessary for the portal buildings, and some of the other work. It was completed later, following that, about the time of the second call for bids.

Q. By "completed later," you mean you secured the sub bids for [524] things like the ventilation buildings, and matters of that kind?

A. And the electrical work; matters of that kind—structural steel work and reinforcing steel, and matters of that sort.

Q. You recollect that the work items number 1 to 47, inclusive,—what we call the "outside work,"—generally refer to—Do you know what they generally refer to?

A. No; I would have to look at that bid sheet to answer you definitely on that.

Q. I will show you Exhibit 14, Mr. Calhoun, and ask whether that refreshes your recollection on the outside work, with respect to Items 1 to 47.

A. Yes, that is right; Items 1 to 47. Well, however, I did prepare an estimate on the matters covered in Items 51 and 55.

Q. Mr. Tinning: And the witness points to Items 48 and 49, Tunnel Construction Type "A" and Type "B", and said "Not those."

The Witness: 48, 49 and 50.

Mr. Wittschen: Does he mean 51 to 55, or 51 and 55?

The Witness: Inclusive, yes.

(Testimony of Chad F. Calhoun.)

Mr. Tinning: Q. In order to understand the matter clearly, so the record will show it: You prepared an estimate of Items 1 to 47 and also Items 52 to 55? A. 51 to 55.

Q. 51 to 55? A. Inclusive.

Mr. Marrin: Is that inclusive, Mr. Tinning?

Mr. Tinning: Yes.

Q. What was the amount of your estimate of the outside work, Items 1 to 47?

A. That, I do not know at this time.

Q. What did you do with it?

A. I turned that estimate over to the W. A. Bechtel office.

Q. You turned it over to whom?

A. To the W. A. Bechtel office.

Q. It was turned over, I think you testified this morning—you gave certain papers to Mr. Larson; is that right? A. That is right. [525]

Q. This bid that you had prepared on these outside items was included with the other papers that you gave to Mr. L. M. Larson?

A. No; it was not; I did not turn that over until later.

Q. When did you turn it over, if you remember?

A. I believe it was around the latter part of April, 1934.

Q. To whom did you deliver it, if you recollect?

A. There were quite a few concerned at that time; I believe there was Mr. Larson, Mr. Hindmarsh and Mr. Shaw.

(Testimony of Chad F. Calhoun.)

Q. Mr. Calhoun, I asked whom you delivered it to—Do you recollect?

A. I was just answering your question, Mr. Tinning. I said there were quite a few concerned that were there in the room together, and I turned it over officially to the W. A. Bechtel Company.

The Court: He said there were three present.

Mr. Tinning: Q. Do you remember which individual you turned it over to? You say you turned it officially over to the W. A. Bechtel Company. Who got it?

A. Well, I am telling you all of those individuals were present when I turned it over. There may have been others there; but I remember definitely Mr. Larson, Mr. Hindmarsh and Mr. Shaw.

Q. Was your estimate larger than the bid that was put in by the Six Companies on May 22nd?

A. My estimate was the estimate of the bare cost alone of the construction of that work, and did not include complete overhead estimates, nor did it include any contractor's profit; so, consequently, it is a little difficult for me to answer your question.

Q. I assume, from your answer, that you intend us to understand that was added to the bid for profit and overhead; so the figures that you gave were less than the amount of the bid on those items which you estimated?

A. Well, I could not state definitely, without an actual comparison of the bid, whether that is so or not.

(Testimony of Chad F. Calhoun.)

Q. You do not remember any item of the 54 items that you estimated, [526] and upon which a bid was submitted by the Six Companies—you have no recollection, with respect to any item?

The Court: Read that question.

(Pending question read by the reporter.)

The Witness: A. Well, may I explain that? I submitted my estimate to W. A. Bechtel Company. At that time, they were forming the Six Companies of California that submitted the bid; just what was done with that estimate, I know some changes were made in the estimate which I submitted,—a good many changes were made at last—the exact figures that were used, I am not at this time familiar with.

Q. You said Mr. Hindmarsh, Mr. Shaw and Mr. Larson were present as the W. A. Bechtel Company representatives at the meeting where you turned over this estimate?

A. Well, at a meeting—it was informal, as things were always quite informal—just merely a trip I made to their office.

Q. This meeting was at the W. A. Bechtel Company office?

A. Yes—in the Stock Exchange Building here.

Q. Did you keep a copy of your estimate?

A. I did not keep a copy of it; but I turned a copy over to the Henry Kaiser Company.

Q. You have no copy of your own? A. No.

Q. You turned over a copy to your employer,—the Henry J. Kaiser Company?

(Testimony of Chad F. Calhoun.)

A. That is right.

Q. You continued with the Henry J. Kaiser Company, as an employee, until the end of 1934; is that correct?

A. No—Until December 1, 1934.

Q. Referring to Exhibit No. 24, Mr. Calhoun, as I understood it this morning you were not certain of the title—that the title on the exhibit which you have there,—“Broadway Tunnel, Engineer’s Estimate of Cost, Joint Highway District No. 13,”—was the same [527] title on the document from which you took the figures that you used in the last five columns on the page—

A. Is that a question?

Q. Yes. Whether I am correct in my understanding that you are not sure of the title?

A. I am not sure, particularly, of the exact wording of the title. I am sure of this: that this is a copy of the estimate supplied to me in Mr. Boggs’ office,—a copy of the copy which we had previously discussed.

Q. Are you sure the title is a copy of the document from which you took the figures?

A. I have said, very definitely, I am not sure the wording is exact.

Q. In other words, when you say it is a copy of the estimate, you refer to the figures which you used for the estimate?

A. I refer to the figures, to the item numbers and to the description of the work.

Q. And the units were something you put in, yourself, after computation?

A. That is my recollection that I did, yes.

Q. I will ask you to look at this document which I hand you, and see whether that refreshes your recollection as the document which you saw on February 17, 1934.

A. Yes, that is. Mr. Tinning, it is not my recollection that the copy that I worked from was in that particular form. So far as the figures are concerned, I don't doubt that; but I mean—

Q. No; I am trying to see where the figures came from.

A. Well, that is all right.

Q. I don't know what you saw at that time, Mr. Calhoun.

Mr. Tinning: Gentlemen, I don't care to encumber the record with a voluminous document. These figures Mr. Calhoun has taken and testified to, under Exhibit 24, apparently came from page 22 of the PWA application made by this District and filed on August 29, 1933, with the United States. We have checked the figures and the [528] units, and they are identical with those appearing on this memorandum of Mr. Calhoun's exhibit for the columns that he testified here—inserting the computations.

Mr. Marrin: Well, I have no objection, Mr. Tinning, to your putting that page in from the report, if you desire to; but I understood the witness to say that it was not his recollection that he copied it from a bulky document of this sort.

Mr. Tinning: No; I understand that. What I want to do is to have the record clear that the figures which he saw were the figures that were filed by the District with the United States on August 29th in connection with the grant application.

Mr. Marrin: Well, I would agree to this: that you may put in evidence, if you desire, the figures that appear in your application to the PWA, and you can draw any inference from that, upon the testimony of the witness, that you desire. I don't know whether he saw this or whether he saw something else.

Mr. Wittschen: He does not appear to know it. We could read those into the record.

Mr. Tinning: If your Honor please, we wish to offer as Defendant's Exhibit "A," page 22 from the application made by Joint Highway District No. 13 of the State of California to the United States PWA, Application No. 2231, which is a breakdown of the various quantities and estimates of the labor and material that would go into this job, and the figures on Exhibit 24 down to the total are identical with the exhibit we are now offering.

The Court: Let it be admitted and marked "Defendant's Exhibit "A."

(Document was marked "Defendant's Exhibit A.")

[Set forth in the Book of Exhibits at page 321.]

Mr. Tinning: I have no further questions.

Mr. Marrin: I have no further questions. [529]